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ABSTRACT

This handbook is an attempt to summarize the most important aspects of juvenile law for a new practitioner, and to offer some additional ideas and strategies to any juvenile defense attorney. The goal is to help improve representation of juveniles across the state of Texas. References to useful books, cases, and statutes are included. The handbook is written with reference to the laws as of September 2002, but since juvenile law changes fairly often, attorneys are encouraged to reference the statutes frequently. (GCP)

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A Handbook For Attorneys Who Represent Juveniles in Texas

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TEXAS APPLESEED
SOUTHWEST REGIONAL JUVENILE DEFENDER CENTER
HOGG FOUNDATION FOR MENTAL HEALTH

Juvenile Practice Is Not Child's Play:

A Handbook For Attorneys Who Represent Juveniles in Texas

Created by Texas Appleseed,
the Southwest Regional Juvenile Defender Center at the University of Houston Law Center,
and the generous support of the Hogg Foundation for Mental Health

September 2002

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Texas Appleseed's mission is to promote justice for all Texans by working to give a voice to individuals and groups that are otherwise overlooked in the legal process. Texas Appleseed has worked on some of the state's most pressing problems. Our work to improve the rights of poor people in the criminal justice system alerted us to the special needs of juvenile defendants and their families. We hope this handbook will help attorneys who represent juveniles.

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I. About This Handbook

Juvenile crime has steadily decreased in recent years,[1] including in Texas.[2] Even so, 47 states, including Texas, have adopted harsher sanctions for juvenile offenders,[3] partially in response to overblown coverage of youth crime in the media.[4]

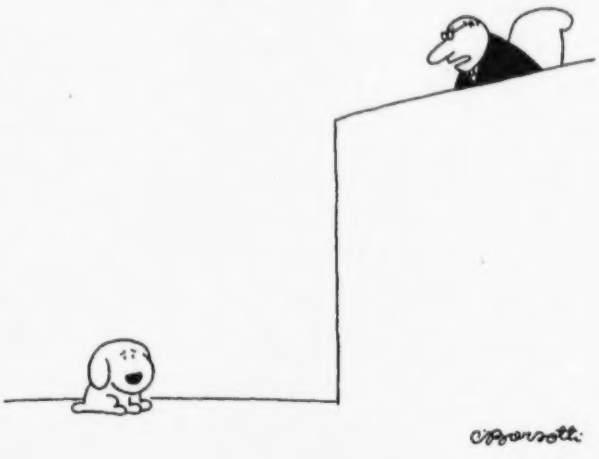
The most severe placement for a juvenile offender in the juvenile system is the Texas Youth Commission, which is designed to incarcerate the most serious and/or chronic youth offenders. Yet in 2001, 64 percent of the youths in TYC had been sent there for nonviolent offenses.[5] Early incarceration can be harmful to child development and can sometimes lead to adult incarceration.[6] Research has repeatedly proven that intensive habilitation/rehabilitation and treatment in a juvenile's home or community not only yields lower rates of recidivism, but also is less costly than incarceration of juveniles in large correctional institutions.[7] Thus, it will be ideal if the players in the system as well as advocates for reform continue to identify and develop alternatives to TYC for eligible youths. This process has begun with many pilot projects around Texas designed to make community-based "wraparound" services available to more children who come into the system.

The plight of children in the juvenile justice system is further exacerbated by the fact that many indigent juvenile offenders in Texas have been poorly represented in court by their attorneys. Excessive caseloads and limited budgets have prevented many appointed attorneys from conducting basic functions such as pretrial investigations, witness interviews, and requests of mental health and/or educational reviews in order to adequately prepare for trial or otherwise dispose of cases.[8] Some attorneys succumb to pressure to quickly plead clients guilty, or readily agree to guilty pleas for their clients thinking that "it's just juvy court." Minority youth are inordinately affected by these problems since youth of color make up a disproportionate percentage of indigent youth in Texas's criminal justice system.

Moreover, the judicial system often does not effectively assess mental health problems and identify treatment needs for juvenile offenders.[9] This situation is particularly troubling considering that almost half of the children adjudicated to the Texas Youth Commission have been diagnosed with a serious emotional disturbance,[10] which often stems from an abusive and neglectful childhood.[11] The overrepresentation of children with mental disorders in the juvenile justice system is partly due to the lack of mental health care available to less privileged children of all races and ethnicities. Mike Griffiths, the director of juvenile services for Dallas County, has pointed out what many have realized: "In Texas the only way adolescents get mental health care is if they're arrested."[12] Nevertheless, the quality of mental health care in juvenile detention facilities has been strongly criticized for failing to adequately treat juveniles or provide enough aftercare.[13]

This handbook is an attempt to summarize the most important aspects of juvenile law for a new practitioner, and to offer some additional ideas and strategies to any juvenile defense attorney. Our goal is to help improve representation of juveniles across the state. This is not a complete reference, and it should not be treated as one. We have tried to include references to useful books, cases, and statutes. This handbook is being written with reference to the laws as of September 2002. Juvenile law changes fairly often, so please reference the statutes frequently. This handbook is available for free on our Websites at www.appleseeds.net/tx and www.lawlib.uh.edu/juveniledefender.

Texas is an extremely large state with 254 counties.



"Do you know what happens to little pups like you in the slammer?"

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Each of these counties varies in its practices. We have tried to get the input of lawyers, judges, probation officers, and other stakeholders in the juvenile system from across the state. You should investigate local practices and philosophies of the local judges, prosecutors, probation officers, and the community. If you have time, observe proceedings in the courts handling juvenile cases. This kind of research can help you in your proceedings and, if the child is adjudicated, in securing the best disposition.

We hope this handbook will help attorneys effectively defend their clients' interests in Texas's juvenile justice system. Zealous advocacy can go a long way toward improving the opportunities for children in our criminal justice system.

II. Top Ten Things To Keep in Mind As You Represent A Juvenile Client

1. **Your client is the child, not the parents:** You must let the parents/caregivers[14] know from the beginning of the case that even if they pay your fees, their child is your client. This is a very difficult concept for most parents, because they have been shuffled from probation to court, had to take time off from work, and may have problems taking care of other children in the family or be dealing with other crises. Parents may be very angry with their child and may feel pressure to resolve the situation. Do not be surprised if the parents are hostile to you or are resistant to the notion that you represent only the child.

2. **Emphasize to your client and the family not to discuss the case with anyone:** Warn your client and the family not to discuss the case with anyone other than you and to advise you if anyone tries to get them to discuss the case. Also, if you are fortunate enough to be appointed before the family goes to probation for an interview, warn the parents not to express anger at the interview (and attend the interview if you can). Many a parent has made statements like "I can't get him to obey me at all," "he runs around and does what he wants," or "some of his friends may smoke marijuana"—only to have these statements come back as "the youth is disobedient and disregards his parents and authority," "parents suspect drug usage due to associates"—or worse. This can cause problems at the time of disposition, and can seriously impact the juvenile.

3. **Juvenile court is not sandbox court:** Contrary to what many people think, juvenile law is not "easy law." Juvenile court is not an arena meant for you to practice in before going into adult criminal law. It consists of a complex, multi-disciplinary set of rules and issues.[15] If the case stays in juvenile court, your client can be sentenced to a maximum of 40 years of incarceration for the most serious offenses.

4. **Mitigate, mitigate, mitigate:** Unfortunate childhood experiences inspiring compassion, without justifying or excusing the offense, can be powerful mitigation evidence. You must investigate your client's background including his or her familial situation, performance and behavior in school, socioeconomic status, medical health, and mental condition. You should try to determine if s/he has ever been abused or neglected. Moreover, you should estimate how family and friends have influenced his or her criminal behavior. A list of things to look for is in Section VI(F).

5. **Make sure your client understands what is happening to him or her:** Whereas children may seem to comprehend what is happening, they often misunderstand their rights and the outcomes of their cases. Remember that some children pretend to understand things they do not because they do not want people to think they are "stupid." It is your responsibility to take time to explain to your client what is happening to him or her, and verify s/he fully understands by having him or her repeat what you said in his or her own words. Avoid using legal jargon—break things down into concepts your client will understand. You may need to go through a similar process with the parents. Make sure your client and parents realize the seriousness of the offense, and what will happen if s/he breaks the law again.

"The state asks that the defendant, although a tadpole, be charged as a frog."

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6. **Avoid confinement, but if necessary, get the best placement for your client:** You should make a concerted effort to ensure that your client is not confined. If your client must be incarcerated, try to find a facility close to home. Research has shown that incarceration of youth often leads to adult institutionalization,

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and that detained youth fare better when placed in their local communities.[16] Juveniles who are not placed in a setting designed to meet their needs are at a greater risk of recidivism. It is your duty to conduct research in order to recommend the best placement for your client at disposition. But try to consider placement only if it is inevitable and the best legal option; remember, you are the attorney, not the guardian ad litem.

7. **Your client is a child:** Child offenders are more and more frequently treated like adult criminals, although they are at widely different stages of human development. Extensive research demonstrates that adolescents develop gradually and unevenly, and that chronological age and physical maturity are unreliable indicators of development.[17] In fact, recent MRI studies have revealed significant structural brain development well into puberty, enhancing our understanding of the extent of continuing development in teenage brains. Adolescence is a period of dramatic cognitive, emotional, physical, and social development. The average teenager can exhibit mature and independent behavior one minute and an instant later behave in an emotionally childish and impulsive manner.[18] Youths have a different sense of time and their memory works differently than that of adults, so lawyers should try to be sensitive. Request shorter sessions in court and frequent breaks. Expect to resolve cases more quickly in juvenile court than in adult court. Delays can be detrimental to a child, to whom 30 days in detention can seem like a lifetime. Juveniles respond better when they are held accountable closer to the time of delinquent behavior.

8. **Build rapport with your client early:** If your client does not communicate with you and relate what happened, you are not going to be able to properly represent him or her. Most juveniles are overwhelmed when they are brought into the system, and may be in trouble with their parents. As a result, the juvenile will tend not to be very communicative. It is the job of the attorney to establish trust and open lines of communication as quickly as possible. If it is possible, meet your client and his or her family before going to court; if not, get out of the courtroom and go somewhere private to discuss the situation with your client.

9. **Be zealous in your representation:** You have an ethical obligation to zealously represent your client, which includes thoroughly investigating the offense and any special circumstances. Sometimes it includes representing the child's legal interests even if they come into conflict with what others think is the child's best interests. If necessary, a guardian ad litem can be appointed to represent the child's best interests.[19]

10. **Be optimistic, patient, and perseverant:** You should never believe that your client is a "hopeless child" or "inherently bad kid" regardless of the gravity of his or her offense and/or juvenile record. People, especially children, can grow into positive-minded, productive, and law-abiding adults. Be patient with your client even if s/he has a negative attitude. You should persevere and try to understand him or her. Don't give up on your client. A big part of his or her future depends on you.

III. The Fair Defense Act and its Implication for Juvenile Offenders

An October 2000 Texas Appleseed report on the juvenile justice system in Texas, "Selling Justice Short: Juvenile Indigent Defense in Texas," outlined major areas of weakness, including limited attorney-client contact, pressure to plead, and insufficient compensation to attorneys to conduct investigative and other supplemental case work.

During the 77th Legislative session, lawmakers focused on problems in the juvenile and adult indigent defense systems and passed the Texas Fair Defense Act, comprehensive legislation that has been referred to as the most important indigent defense reform in the country in the last quarter century. The law requires prompt appointment of counsel to all indigent defendants and juveniles; qualification standards for attorneys for each level of offense; a fair, neutral, and non-discriminatory method of appointing counsel; consistent standards for indigence within counties; reasonable fee schedules taking into account overhead costs of attorneys; appropriate provisions for experts and investigators; and minimal standards for attorneys in capital cases. The legislature also appropriated almost $20 million in grant funds for the biennium to supplement county spending, the first such infusion from the state.

The Fair Defense Act requires that each county's juvenile board adopt a plan for the appointment of counsel to juveniles whose families are unable to afford counsel and sets out basic guidelines for the appointment process. The law also requires qualification standards and a fee schedule that addresses juvenile appointments. In addition, it requires that you make every reasonable effort to contact your client by the end of the first working day after the date on which you were appointed, and interview your client as soon as practicable after you have been appointed.

The advent of the Fair Defense Act should mean that your county is moving in the right direction toward a fair system of appointments to qualified attorneys and that your fees are reasonable. It should mean that the process for getting experts and investigators paid for in your appointed cases is better. It should mean that only qualified attorneys are being appointed in juvenile cases, and that there are qualification requirements for various levels of juvenile appointments. If your county is not improving on some of these fronts, you might want to contact the juvenile board and other local officials, or the statewide Task Force on Indigent Defense, to determine the impediments to improvement. Efforts by local groups and individuals to keep county officials on track will help speed the rate of progress across the state.

IV. The Investigation

A. The Initial Interview

An initial client interview should generally take place well before any court hearing. If appointed or retained in a juvenile case where your client is in detention, you will at first need to focus on detention issues and remind your client to avoid making statements to the authorities or other detainees. But you should know that your client's statements made during a detention hearing are inadmissible during an adjudication hearing, so you may want to make some admissions regarding areas important to detention, for example admitting to recent drug use to prevent any drug testing. You need to do a separate full-scale interview after the detention hearing to focus on the case and other issues.[20] When arranging an interview, ask parents to bring any documents relating to the case, including petitions, school records, birth certificates, and any records of mental or physical illnesses. Try to find out what the offense is and any offense history beforehand so you can advise the family as to the likely range of punishment in the case.

Keep in mind that your client is not an adult. S/he lacks the emotional maturity of an adult, and understands "legalese" even less than an adult. It is very important to try to ascertain whether your client understands what you are telling him or her. One good trick is to get your client to explain back what you have told him/her to make sure s/he is comprehending (and paying attention). At first, ask your client to explain what happened and do not interrupt no matter how confused you get. Ask questions once your client finishes. This helps in not letting your client forget things s/he was planning to tell you.

During your initial interview, you should try to find out everything you can about your client's life, and any problems in it. You need to know what is going on at school and at home, who s/he hangs out with, where s/he lives and what the community is like, what kind of prior trouble your client may have been in, and any problems, physical or mental, that may affect his or her behavior. These may include mental illnesses (see Section V), developmental disabilities (Section VI(A)), physical illness or disability, abuse in the home, and many other issues (for a checklist of things to look for, see Section VI(F)).

You will need to work on establishing trust and rapport with your client, who may be upset and confused and may not trust strangers, grownups, and lawyers. Be patient and appreciative of the information the client shares, and try to explain why you need to know so much information that may not seem relevant to the child. A complete explanation of the attorney-client relationship and privilege are essential, and this can help underscore the reasons not to talk to others about the case. Make sure your client understands that the privilege means you will not tell parents, probation officers, judges, or anyone else. Give your clients a heads up about having to tell about child abuse or future violent crimes before you begin.[21] Texas Family Code § 261.101(c).

Use layman's terms and age-appropriate vocabulary, especially if your client will testify in court. You should also make a point of explaining the following terms to your client: right, case, interrogation, confession, adjudication, disposition, petition, prosecutor (D.A, District Attorney, County Attorney), and status offender.[22] Also make sure you explain to your client what your job is as a lawyer (counsel), and how you are supposed to help. Note that juveniles may not know that attorney, lawyer, and counsel are all the same.

What about the parents? In most areas of the law, attorneys have contact with the relatives and loved ones of their clients. In juvenile cases, that contact is significant-

"Again? I read you your Miranda rights last night."

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ly more important and complicated. For example, having your client's parents present when you meet with him or her is a gamble that could seriously hurt his or her interests. You must explain to the parents that you need to meet with your client alone, even if you spend some time talking to the client and his or her parents first about general issues.

Parental intervention will prevent you from being able to talk freely with your client and provide him or her with sound legal advice, because the attorney-client privilege is broken by their presence.[23] Additionally, Rule 1.05 of the Rules of Professional Responsibility states that you may not reveal confidential information to your client's parents without your client's consent. Make sure your client is aware of this rule. You should always stay in communication with your client's parents, especially since your client is most likely returning home, but remember that you represent the child and not the parents. TEXAS FAMILY CODE § 51.10.[24] It may be difficult for parents to understand that they are not your client, especially since they often are footing your bill. But you need to carefully manage your role and that relationship. That relationship will be critical in securing the best disposition for your client and getting your client out of detention.

Keep in mind that the parents can be the complaining witnesses in the case, or they may pressure the child to confess. You are the expert in the juvenile system and should explain the implications of various courses of action to your client and to the parents.

Often, parents are understandably upset after their children have been arrested, and may be very distressed when you see them. They may assume that their child is guilty of the charges brought against him or her before guilt has been established, and may make incriminating statements in the presence of the police. Notify your clients' parents to be mindful of what they say, especially in and around the courthouse. Inform them that they can legally be subpoenaed to testify against their child in court, even if they don't want to. Suggest that they deal with their child at home or later, but let you handle contact with the police and prosecutors.

When discussing case strategy, especially offers from the prosecution, you should talk to your client first and then explain things to the parents. You must always relay an offer from the D.A. to your client, even if the parents do not want you to. Again, you will have to be firm in explaining the client relationship with the child to the child's parents.

B. Discovery

Juvenile cases are governed by the criminal rules of discovery, not the civil ones. This significantly limits the usefulness of discovery. However, there are a number of techniques to get useful information from the prosecutor. In many counties, the prosecutor's office has an open file policy. If this is the case, you may view the prosecutor's file. One of the first things you will want to do when you get a case is to go over this file. Generally there are limitations as to when and where you are allowed to view the file. Typically you are not permitted to photocopy items from the file or to remove the file from the court or prosecutor's office.

The file will usually include police reports, criminal history, and copies of the petition. You should always note the following: the police incident report number (often you can get a copy of the police report from the station that prepared the report), police officers' phone numbers, badge numbers, and names. In addition, get the phone numbers and addresses, both home and work, social security numbers, drivers' license numbers, and dates of birth, wherever possible, of all the witnesses. The more information of this type you can obtain from the reports, the easier it will be for you or your investigator as you investigate the case. Try to make exact notes of what is in the file. If you do not make exact notes you may miss out on impeachment opportunities or be unable to recall an important detail in the report.

Don't overlook the probation report. It can be an invaluable resource. If you have any trouble gaining access, try looking to § 58.005.

There are some instances in which you can use discovery, and the open file policy is not sufficient to satisfy the discovery requirements. These include exculpatory evidence (*Brady* material), lists of experts, and use of prior adjudications or bad

acts. Where discovery will be done through motions, file your pretrial motions and request a hearing to get a ruling; send notice letters to get extraneous offense information, and be conscious that some items are only triggered if you ask for them.

Find out how your local police agencies deal with subpoenas and information requests. There may be certain information that is confidential due to the fact that your client is a juvenile. Get the local law enforcement agencies' procedure manuals. Look up court records, including prior testimony or convictions, of all witnesses.

C. Witnesses

There are a number of different people you may want to interview and possibly call as witnesses. Because there are so many types of hearings in juvenile court, think about each person's role in the case and for which hearings their testimony might be useful.

When interviewing witnesses, it is best if you can have an investigator or other person asking the questions. If you are the only person who was present when asking witnesses questions, and they subsequently change their story, it will be very difficult to impeach them, and it may put you in a position where you would have to remove yourself from the case.

Try to talk to all witnesses as soon as possible so that their memory is fresh. Try to prepare all of your witnesses for trial. At the very least, give them all an idea of what to expect, what to wear, and how to behave. Try to observe the court in which you will be appearing in advance to determine any idiosyncracies.

Counsel your testifying witnesses as follows:

- Cut down on stammering, "ums," "ers," and "likes," and other verbal tics.
- Avoid colloquialisms and slang.
- No fidgeting.
- Be polite to all court personnel.
- Dress appropriately (explain that this means no shorts, t-shirts, tank tops, baggy pants, and avoid popular gang colors such as red and blue), and don't chew gum in court.
- Go at a comfortable pace, and tell the lawyer if you need a break.
- Pause before answering questions from opposing counsel (explain that this allows you time to object to the question if it is improper).
- Stay calm and don't get upset.
- Make sure to eat and drink sufficiently beforehand because court can take a long time.
- Tell the truth.
- Answer only what is asked, don't volunteer additional information. Don't guess.
- Don't answer a question you don't understand; rather, ask for it to be rephrased.
- If an objection is made, wait for the court to rule and follow the attorney's instructions.
- Make sure the ends of sentences don't sound like questions.

YOUR CLIENT Whether you want your client to take the stand is always a difficult decision. On one hand, jurors have a difficult time finding a person not guilty if they do not testify to their innocence. On the other hand, the testimony can open impeachment avenues, prior bad acts, and all sorts of things upon which a jury will not look favorably. Ultimately, it is not even your decision; the client has a right to testify. However, in your role as "counselor at law," you have a duty to counsel your client in the strongest terms as to your opinion regarding whether s/he testifies.

With a juvenile, this can be a more difficult decision. Many times a juvenile will be given even less credence than an adult defendant. This is extremely important when your client is contradicting the testimony of a police officer or school official. Juveniles often sound less sure of themselves than do adults, and you will have to rehearse with your client so that his or

her demeanor inspires confidence in his or her testimony. Body language is important as well. If your client is dressed well, speaks directly, and has appropriate body language, s/he will be more believable. Even if your client will not testify, you need to spend time preparing his or her demeanor in court. Let your client know that all eyes will be on him or her at critical stages of the proceedings and s/he will be judged by reactions and demeanor.

Other Juvenile Witnesses Often the witnesses of acts in juvenile cases will be other minors. To interview them, you should generally obtain their parents' permission as well as that of their counsel if they are represented. If they are opposing witnesses, you will need to appear sympathetic, but it is incumbent upon you to use the inexperience and immaturity of the witnesses to discount their testimony. Keep in mind that this child may have ample reasons to lie or may have been extensively coached by the prosecution. Also, watch for exaggeration from the witness.

Parents Parents can make difficult witnesses. Sometimes (and these are the hardest times) parents are the complainants. If they are testifying for your client, that will usually take place at detention or disposition hearings. Mostly they will be asked about their child's behavior.

Remember when calling parents to testify in favor of their children that they can be upset with their child and fearful of the circumstances. Often when parents talk with the police or with probation, they say extremely negative things about the child. This can limit the utility of calling a parent to testify about how good his or her child is, because they are subject to impeachment. "Your child is wonderful? But didn't you tell officer so-and-so that you could not control him and he just wouldn't do what you said?"

While it may seem less urgent than with your client or other juvenile witnesses, it really is important to explain appropriate wardrobe choices to parents. They may not realize how important their appearance can be for the case.

If the parents are testifying against your client at adjudication, try to keep their testimony restricted only to the matters directly related to the offense. Testimony about the child's behavior at home or their general demeanor is irrelevant to guilt or innocence.

Teachers It has become more common for teachers or school personnel to be the complaining witnesses in juvenile proceedings. These witnesses may hold as much sway with juries and judges as do law enforcement officers. It may be difficult to counter the testimony, but at least try to minimize its effect. In adjudication, make sure to try to keep the testimony only on the events surrounding the alleged offense. It is usually inappropriate for the prosecution to try to introduce other bad acts to show guilt for the alleged offense.

Teachers can have helpful testimony for disposition. See if there are any teachers that your client is close to and whether they would be willing to give positive testimony. If there is a teacher who is being brought in by the prosecution to attack your client, this will help deflate that testimony; if not, it can be persuasive to the court that there is room for rehabilitation. In addition, if your client has good grades, strong extracurricular activities, or other achievements in school, make sure to raise those facts. Teachers may also know of other problems your client has that may be relevant to your case. Remember, a general proclivity toward behavioral problems does not establish guilt in this situation.

Police Officers Some things you may want to learn about the police officers in your case include what training they have in dealing with youth, other cultures, and the mentally ill. If the officer does not have any training on youth behavior and is characterizing your client's behavior as suspicious or odd, you may be able to attack the officer's credibility in making that determination. Think about what the officer's testimony will be used to prove.

Try to keep the officer from testifying to hearsay in the adjudication hearing. This includes the use of notes. If the officer is using notes, try to force him or her to use the "recollection recorded" or "refreshed recollection" exceptions to hearsay. These

can help emphasize to the jury that the officer was not able to remember the events, and in some situations can get you access to notes that would otherwise be protected by the work-product privilege. For other hearings, the Rules of Evidence are usually relaxed so that hearsay is admissible. If you think it is a particularly important issue, you can try to exclude it on a Sixth Amendment right to confrontation basis.

Probation Officers Probation officers can be very important to your case. Their opinion on disposition often carries significant weight with the fact-finder. It is very important to talk with probation early on.

Probation enters into a juvenile case at the outset. If the youth is taken to detention, then probation will do an intake interview. Depending on the county, probation may make the determination of whether to charge a youth. Most of the time, probation will do an interview with the parents and child. They will use this interview to prepare a report for the court. Note that probation officers should not be testifying in adjudication hearings. Keep them off the stand until disposition.

Experts You may have the same range of experts in a juvenile case that you would in a criminal case. For most experts, there will not be a significant difference in how they do their job. A ballistics expert will not be impacted by the age of the defendant. Mental health professionals are a different story.

Mental health professionals need specialized training to be able to adequately diagnosis or examine children and adolescents. In fact, expert witnesses should possess special certification or licensure. Not only do they need to have appropriate training and credentials, but the tests that they use must also be designed to be used with children or adolescents. An example of this necessity can be seen in one of the tests for psychopathy designed for adults. In this test, one of the indicators for a psychopathic personality is that they still live with their parents, which is obviously no such indication for a child. There are also certain diagnoses, such as personality disorder, that are usually reserved for people over the age of 18.

If there is a diagnosis made, don't merely accept it. Review it. Diagnosis should be based on the DSM IV-TR (Diagnostic and Statistical Manual IV Text Revision).[25] This book is recognized by most of the mental health professionals in the nation as the learned treatise on Mental Disorders. The DSM V will be out fairly soon and will then be the standard. The DSM lists what symptoms need to be present for a diagnosis to be assigned and what other disorders need to be ruled out. Also, look to see if any tests were used to make the diagnosis. If the expert used a test, is it a reliable test that was designed for adolescents or children?

When investigating experts, make sure to pay attention to their backgrounds. Look at where they went to school. Look at the groups that certify forensic experts in the field of the expert. Almost every conceivable group of experts has an organization for certifying forensic experts. See if there are different levels of expertise and what level the expert has attained. If the expert does not belong to one of these organizations, and there is one that fits, why isn't the expert a member? Remember that you can make a *Daubert*-type challenge to an expert who is not qualified or whose testimony is not based on valid work.

D. Scene

One of the best ways to get a sense of the alleged offense is to visit the scene. Bring a tape measure and take pictures of the scene from all angles. If your client, or someone else who is familiar with the events alleged, can go with you and describe events, that is usually the most helpful. Take pictures of the scene. Going to the scene can help give you a sense of distances and lines of sight that you cannot get otherwise. It can also help you determine if witnesses are accurately describing events. To find out the conditions on the day of the offense, the Department of Public Works may have information about luminosity, street lights, foliage, etc., that will be helpful to your case. If you can do so safely, try to go to the scene at a time near the time of the alleged incident. This will provide you with a better perspective of how the scene was at the relevant time.

V. Clients With Mental Disorders

Mental disorders in children often differ from those in adults in presentation, diagnosis, and treatment. For example, depression in adults may be expressed as sadness or hopelessness, while depression in an adolescent may manifest as aggressive or irritated behavior. What we traditionally understand to be mental illness in an adult typically involves disturbances in the neurochemistry of the brain (e.g., major depression, bi-polar disorder, and schizophrenia). While children and adolescents may also be diagnosed with such brain disorders, it is often much more difficult to accurately diagnose them because of the multiple factors that may result in the same or similar symptoms such as acting out or emotional instability. Many symptoms of mental disorders, such as outbursts of aggression, difficulty in paying attention, or fearfulness may be normal at various points in a child's development and, because of this, they may go unrecognized as a mental disorder. Or, attorneys and court officials may just consider these symptoms of mental disorders to be an indication that they are dealing with a "bad" child.

National estimates of how many children in the juvenile justice system have mental disorders vary widely depending on which mental disorders are included in any given study. In Texas, the relatively broad definitions of mental disorders in children include at least the following:

Mental Illness:[26] Article 571.003(14) of the Texas Health & Safety Code (also called the Mental Health Code) defines mental illness as "an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that:

(A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or

(B) grossly impairs behavior as demonstrated by recent disturbed behavior."

Mental illness exists on a continuum and is the result of a complex interplay of brain functioning and environmental factors. Often, a combination of medication and clinical treatment such as psychotherapy is used to treat mental illnesses, although many professionals shy away from prescribing medication for children as readily as for adults and instead make therapy the focus of the child's treatment.

Serious Emotional Disturbance: Generally a broader term than mental illness, this condition is identified in a youth when his or her internal emotional condition is associated with significant impairment in his or her social or academic functioning. This term is widely used to describe many mental disorders in children, including Conduct Disorder or Attention-Deficit/Hyperactivity Disorder (ADHD), when those disorders become serious enough to affect significantly the way a child functions. Attorneys who work in the juvenile justice system will probably hear this term a lot.

Disruptive Behavior Disorders: A category of children's disorders (including ADHD, Conduct Disorder, and Oppositional Defiant Disorder) that is characterized by disruptive, angry, or destructive behaviors. This diagnosis is very common in children in the juvenile justice system.

Disorders of Anxiety and Mood: Disorders, such as Major Depressive Disorder and Posttraumatic Stress Disorder, that are characterized by the repeated experience of intense internal or emotional distress over a period of months or years. Feelings associated with these conditions may be those of unreasonable fear and anxiety, lasting depression, low self-esteem, or worthlessness.

Substance Abuse and Dependence Disorders: A pattern of substance use that results in a child's failure to fulfill obligations in school or at home. A recurrent use of the substance in situations where it is physically hazardous or the continued use of a substance despite the development of interpersonal problems related to its use.

Mental Retardation: Below average intellectual functioning that is apparent before age 18 and limits the person's ability to function normally in communicating and relating with others, caring for him/herself, having age-appropriate functional academic skills, and in other major life areas. You should be particularly careful not to use the terms "mental illness" and "men-

tal retardation" interchangeably because, although both are mental disorders, they are very different conditions. The information in Section VI (A) of this handbook may be particularly helpful if you are representing a client who has mental retardation.

Mental disorders are especially prevalent in youth sent to TYC. In 2001, mental health professionals at TYC diagnosed 42 percent of youth to have a serious emotional disturbance at the time of commitment. This figure is particularly startling when one considers that children with other mental disorders and children with mental retardation are not included in these estimates. Unfortunately, research demonstrates that most judges, prosecutors, defense counsel, and probation officers are insufficiently trained to understand the mental health needs of juveniles with mental disorders and the results of evaluative tests.[27] These children often go misdiagnosed or undiagnosed and end up repeatedly cycling through the juvenile justice system. Some of these misdiagnosed or undiagnosed children move into the adult criminal justice system when they get older. By understanding the basics about mental health issues in the juvenile justice system, you can go a long way toward better representing your juvenile clients with mental disorders.

A. Signs and Symptoms

While many mental disorders surface in the juvenile justice system, those listed below are the most prevalent. Mental disorders manifest differently in different people and many co-exist, but the most common manifestations of a particular disorder are included under that disorder to help attorneys recognize symptoms and patterns that may alert them to the need for an evaluation. Children in the justice system often have multiple disorders and attorneys should be skeptical of evaluations that result in only a single diagnosis, especially Conduct Disorder.

1. Conduct Disorder
   - Aggression to people and animals (e.g., bullies, threatens, or intimidates others; initiates physical fights; uses a weapon that can cause serious harm to others; is physically cruel to people or animals; steals while confronting victim; or forces sexual activity);
   - Deliberate destruction of property;
   - Deceitfulness or theft; and
   - Serious violations of rules (stays out at night past curfew; runs away from home; is truant).
2. Attention Deficit/Hyperactivity Disorder
   - Inattention (e.g., has difficulty organizing tasks or activities; does not seem to listen when spoken to; fails to follow through on instructions; has difficulty sustaining attention in tasks, play, or when spoken to; avoids or dislikes tasks that require sustained mental effort; often loses things necessary for tasks and activities; is easily distracted; forgetful);
   - Hyperactivity (e.g., fidgety; runs or climbs excessively in situations in which it is inappropriate; talks excessively); and
   - Impulsivity (e.g., blurts out answers before questions have been completed; has difficulty awaiting turn; interrupts or intrudes on others).

   Note: This disorder may be less conspicuous in less structured settings (like recess) than in more structured settings (like the classroom or courtroom), which may explain why some parents do not see the condition as described by someone dealing with the youth in more structured environments (e.g., a teacher dealing with the child in a classroom).
3. Posttraumatic Stress Disorder
   - Exposure to a traumatic event involving actual or threatened death or serious injury to self or others and response to event is fear, hopelessness, or horror (in children, may be expressed by disorganized or agitated behavior and may have been triggered by sexual or physical abuse; often misdiagnosed in children as suicidal behavior);
   - Persistent re-experiencing of the event (e.g., repetitive play in which themes or aspects of the trauma are expressed; recurrent distressing dreams of the event; trauma-specific reenactment);
   - Avoidance of stimuli associated with the trauma and numbing of general responsiveness (e.g., markedly diminished interest or participation in significant activities; feelings of detachment or estrangement from others; inability to have certain feelings/emotions; sense of a foreshortened future. This symptom may also express healthy, adaptive functions: the child protects himself or herself by avoiding re-experiencing the trauma over and over);

- Persistent feelings of increased arousal (e.g., difficulty falling or staying asleep; irritability or outbursts of anger; difficulty concentrating; hypervigilance; exaggerated startle response); and
- Duration of symptoms is more than one month.

Note: Children can be especially vulnerable if afflicted with this disorder. They generally have fewer problem-solving resources needed to understand a trauma, or complex emotions, and have fewer life experiences with which to compare and decide a healthy course of action.

4. Depressive Disorders
   - Irritability or oppositional behavior;
   - Poor appetite or overeating;
   - Insomnia or hypersomnia;
   - Low energy or fatigue;
   - Low self-esteem;
   - Poor concentration or difficulty making decisions; and
   - Feelings of hopelessness.

5. Substance Abuse and Dependence
   - Abuse: pattern of adverse events associated with the drug use (e.g., repeated arrests for driving while drunk, losing jobs, fighting with spouse or other family members about drinking); and
   - Dependence: suggested by the development of tolerance for the drug, withdrawal, and/or the expression of compulsive behaviors (e.g., covering up, stashing drugs, lying, etc.)

   Note: The child's amenability to treatment could serve as a mitigating factor.

B. What To Do If You Suspect Your Client May Have a Mental Disorder

1. Ask both broad and narrow questions: Young people may not see the "big picture" when you interview them and often will not volunteer important related information simply because it was not asked about. (This may be especially true when there is a mental disorder at play. So, for example, you may want to ask not only "What happened?" but also "Did anything else like that ever happen?")

2. Slow down and order an evaluation if appropriate: You may miss important symptoms and clues if you do not spend a good amount of time talking with your client and gathering information from parents. Cultural differences sometimes unintentionally lead to misidentification of symptoms. A careful review of the youth's social history is important. If you have any reason to believe that your client is incompetent, order an evaluation. If competence is not an issue in the case, but you have reason to believe that your client has a mental health problem, you may or may not want to order an evaluation. See Section C(1) below.

3. Be patient and let your client know you are on his or her side: Lawyers and court officials often miss clues of mental disorders in children, chalking up aggressive or oppositional behavior to the antics of a "bad" kid. Do not just disregard your client as a "bad apple." If your client has a mental disorder or substance abuse disorder, s/he may be irritated, belligerent, or see you as a threat. Some of your client's actions, reactions, and mannerisms may be irritating. Try to respond with patience.

4. Visit parents, family, and teachers: Unlike adults, your juvenile client may not have a mental health record because his or her mental health problems may be very recent. In addition, children and families may have been reluctant to access mental health authorities because of the perceived stigma associated with mental disorder labels. You may have to gather your information by asking pointed questions of parents, family, and teachers, including:

   - Has there been a sudden change in the child's behavior? (this may be indicative of a major depression or substance abuse)
   - Is this the child's first offense?
   - Has the child recently started using drugs?
   - Has the child fallen in with a bad peer group?

- Have the child's grades dropped or has s/he stopped doing homework or been truant?
- Has the child ever appeared in JP court?
- Have there been any recent traumatic events in the child's life?

5. If a mental health record is indicated, collect the appropriate documentation, such as:
   - Family records;
   - School records;
   - Hospitalization records;
   - Medical records from doctors or clinics;
   - Child Protective Service records;
   - Intake records;
   - Results of any psychological screenings (almost all detention facilities in Texas are now administering the MAYSI II, (Massachusetts Youth Screening Inventory II), to gauge whether children entering the facility have signs of emotional disturbance. Some counties are also administering the Diagnostic Interview Schedule for Children, or DISC IV, to youth entering detention. This instrument actually gives children a provisional diagnosis if symptoms are present and is an indication of a need for further evaluation by a qualified mental health professional); and/or
   - Probation records from the probation officer who may have supervised your client in a previous case.
6. Encourage your client to be honest and forthcoming with you: Many adolescents value loyalty above almost anything else. Emphasize to your client that you are his or her ally in the process and you will be representing him or her, and no one else, in the process. Your client may be more forthcoming if s/he feels that you are on his or her side.
7. Do not speak about mental disorders in a disparaging or derogatory manner: Adolescents may not be aware or may not be willing to acknowledge they have a mental disorder. The same is true of their parents. Do not add to your client's feelings of helplessness, embarrassment, or shame about his or her mental health problems. Speak frankly about the problems, but never use slang to discuss them.

C. Evaluations and Evaluators[28]

1. You may not always want to order an evaluation. Certain mental disorder diagnoses could have a prejudicial effect on judges or juries. Disorders considered "untreatable" by some may be used by prosecutors and/or probation officers to argue for commitment to TYC, determinate sentence, or transfer to adult court. In these situations, the argument may be made that rehabilitation is not possible. Remember, if you think your client is incompetent to proceed, you should order an evaluation. If you decide to get an evaluation, you should always keep all of the points listed in this section in mind.
2. There are critical differences between a therapeutic evaluation and a forensic evaluation: Unlike a therapeutic evaluation, a forensic evaluation is not initiated by the child's parent, but by an attorney or the court and can be compelled over the objection of your client. The information obtained in the forensic evaluation is not confidential, but evaluations requested by you may be covered by the attorney-client privilege. You should seriously consider filing an *ex parte* motion for an evaluation (see Section VII(B)(2)), which will preserve the examination results as confidential. If the court does not grant your motion, object on the record. Remember, a forensic evaluator retained by the court works for the court and may not be made readily available to you without the consent of the court and the results will not be treated as confidential. If your client does not object, ask the judge if you can attend the examination or at least videotape or audiotape it.
3. If you are requesting the evaluation, be specific about the questions the evaluation is expected to answer and the purposes for which it will be used. The judge may want the examination to cover issues surrounding culpability at the time of the offense, as well as penalty phase issues; do not consent to this type of examination.
4. You have a right to demand a high-quality product from the mental health examiner. A good evaluation will include:
   - Relevant identifying information (e.g., who referred the evaluation, whether it was completed by a court appointed examiner or by a defense expert via an *ex parte* motion; your client's involvement with the juvenile justice system);

- Statement of legal question to be addressed;
- Identification of all sources of information relied upon;
- Description of relevant mental states, capacities, abilities, knowledge, and/or skills that are relevant to the legal question at hand;
- Description of the relationship between the mental states, capacities, abilities, knowledge, and/or skills assessed and their causal connection to the youth's abilities or issues about which the court is interested (it is critical that the mental health expert make this connection);
- Information that contextualizes the conclusions;
- Information qualifying the conclusions drawn and consideration of any external limitations that should be taken into account when relying on the evaluator's conclusions; and
- Specific recommendations for intervention (when appropriate) with a reasonable attempt to identify interventions that are available in the community.

5. If a test was administered to your client, ask these basic questions about the test:
   - What does the test purport to assess?
   - For what purposes has the test been demonstrated to be valid?
   - Is the test appropriate to use with children? Have norms been developed for children? Was the test developed specifically for children? For children involved in the juvenile justice system?
   - Is there any reason to believe that the test is biased with respect to race or gender?
   - Has the most recent version been employed? Why or why not?
6. The evaluation should be developmentally sensitive (i.e., the evaluation should provide qualitative information about where the juvenile is in his or her cognitive, moral, and identity development and what areas of growth remain). This type of information may be particularly helpful in identifying treatment options for your client.
7. Refrain from attacking the validity or reliability of the evaluation's findings without consulting a mental health expert because of the technical knowledge involved.
8. Pay special attention to the diagnosis of conduct disorder. Conduct disorder often coexists with one or more other mental health disorders and you want to be sure that those other disorders have not been overlooked.
9. It is important to get a qualified evaluator. Be sure the evaluator:
   - Understands the relevant law and psychological factors at issue;
   - Has not previously been involved with the child in any kind of treatment or therapeutic capacity, including during the time the case has been pending;
   - Has the relevant clinical knowledge and experience, including training with adolescents;
   - Has had the appropriate training in working with youth from minority cultures (a majority of kids with mental illness in the juvenile justice system are minorities, so it is especially important that you ensure a culturally competent evaluation); and
   - Has training specific to the type of evaluation being conducted.

D. Critical Phases and Aspects of Your Client's Case

1. Detention

   This is the first place your client will go after being arrested. While information gathered at intake or during the psychological screening may help you determine whether your client has a mental health issue, you should be aware of possible Fifth Amendment issues if intake personnel and/or the psychological screener has asked your client

incriminating questions (e.g., "Do you use drugs?"). At the detention hearing, one of the critical inquiries the judge will be making to determine whether your client needs to be further detained is "Is there adequate supervision at home?" You should investigate your client's home situation as soon as you are appointed to or retained in the case so that, if there is evidence of adequate supervision at home, you can show it to the judge and get your client out of detention quickly. Detention can particularly harmful to youths with mental disorders.

2. Pretrial

If your client has a mental disorder, you may be able to get his or her case dismissed by gathering his or her mental health information and/or records and sharing these with the prosecutor. You need to be very careful with this approach, however. Make sure you explain the pros and cons to your client. If the prosecutor with whom you are dealing is sensitive to mental health issues, this approach could work well, especially if your client has been charged with a non-violent offense and there is no complaining witness. However, if the prosecutor is not sensitive to mental health issues, you don't want to share with the prosecutor information that could hurt your client down the road.

3. Commitment

Your client may ask that you move for a commitment because s/he has heard that s/he will get to leave detention and move to a mental health facility and has also heard that s/he gets to wear his or her own clothes and eat better food. You have an obligation to explain that questions about mental health commitments may show up later in life in contexts that could make your client feel uncomfortable. For example, a potential employer may ask about whether your client has ever been committed to a mental health institution on a job application. You should also tell your client that the time of confinement if s/he goes to a mental health facility may be longer. Remember that indications of mental health problems may hurt your client in front of certain judges and juries if your client ever enters the juvenile justice system again. You should not move for a commitment just because your client asks and in the absence of a genuine belief that your client meets the commitment criteria. If you move for a commitment, you should carefully read and review §§ 55.12-55.18 and the Texas Health & Safety Code provisions to which the Family Code cites. You should also know that your client is entitled to a hearing before a jury on the issue of a temporary commitment, but you must request a jury. TEX. HEALTH & SAFETY CODE ANN. § 574.032(a). Your client will automatically get a hearing before a jury on the issue of an extended commitment unless you waive the jury. TEX. HEALTH & SAFETY CODE ANN. § 574.032(b).

4. Competence to Confess/Waiver of *Miranda* Rights

If your client made a confession, you may want to request an evaluation to determine whether your client was competent to do so. Factors that might suggest referral for an evaluation are:

- Age or immaturity;
- Limited intellectual functioning;
- Poor verbal skills;
- Difficulty communicating with client;
- History of poor academic achievement;
- Under influence of substances at time of interrogation;
- History of emotional and/or behavioral problems;
- Length of interrogation; and
- Interrogation in absence of parents if one or more of the above factors exist.

If you decide to ask for an evaluation, you may want to ask the evaluator if s/he is familiar with Thomas Grisso's *Miranda* Waiver Measures. This is a widely accepted instrument for testing whether children understand their *Miranda* rights.

5. Transfer to Adult Court

If your client is transferred to adult court, s/he will be facing adult punishments. If transfer is an issue in your client's case, you should carefully read and review § 55.19 and the other Family Code provisions and Texas Code of Criminal Procedure provisions to which § 55.19 cites. You may have a legal issue if the court attempts to transfer your client to the adult system when s/he is incompetent.

6. Fitness to Proceed (Competence to Proceed)

The relevant inquiry to determine fitness to proceed is: Does the child, as a result of mental illness or mental retarda-

tion, lack the capacity to understand the proceedings in juvenile court and to assist in his or her own defense? § 55.31(a). If your client is unfit to proceed (incompetent to proceed), you should request an evaluation. Factors that might suggest referral for an evaluation are:

- Difficulty communicating with client about case;
- Age, in particular for younger adolescents;
- Limited intellectual functioning;
- History of poor academic achievement;
- History of emotional/behavioral problems; and
- Being tried in an adult court.

You should carefully read and review §§ 55.31-55.45 and the other Family Code provisions and Texas Health & Safety Code provisions to which the Family Code cites. There are some differences between how persons who are found to be unfit (incompetent) to proceed because of mental illness and those who are found to be unfit to proceed because of mental retardation are treated under the law and you should carefully study the relevant Family Code sections for these differences. You should know that if your client is found unfit to proceed because of a mental illness, your client may avoid commitment to a hospital setting if the court determines that s/he can be adequately treated in an alternative setting. § 55.33(a)(2). You should be seeking alternative treatments in your client's community to present to the court in order to keep your client from being committed to a hospital.

7. Lack of Responsibility for Conduct (The Insanity Defense)

The relevant inquiry to determine lack of responsibility for conduct is: At the time of the alleged conduct, did the child, as a result of mental illness or mental retardation, lack substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law? § 55.51(a). Factors that might suggest referral for evaluation are:

- Age, in particular for younger adolescents;
- Limited intellectual functioning;
- History of poor academic achievement;
- History of emotional/behavioral problems; and
- Third-party accounts alleging unusual/bizarre/disorganized behavior by your client at or around the time of the offense.

If you pursue an insanity defense, you should carefully read and review §§ 55.51-55.61 and the other Family Code provisions and Texas Health & Safety Code provisions to which the Family Code cites. You should know that the test for lack of responsibility for conduct (insanity) in juvenile court is broader than that in adult court, where the question of whether the defendant lacked the capability to conform his or her conduct to the requirements of the law is not part of the insanity inquiry. Also, if your client is pursuing this defense, get going early. Find a reputable doctor (psychologist or psychiatrist) as quickly as you can and have that individual immediately interview your client. Have the interview videotaped if you can, especially if your client is exhibiting signs of psychosis. Your client may be given medication that will alleviate the symptoms of his or her mental illness soon after s/he is admitted to detention. The symptoms of your client's mental illness need to be preserved as evidence for the jury before this medication takes effect. Finally, be aware that some judges do not realize a verdict that the child is not responsible for his or her conduct is not an automatic "get out of jail free" card. Instead, this verdict is followed by a hearing to determine whether your client's lack of responsibility is the result of mental illness or mental retardation. § 55.52. If the court determines that your client's lack of responsibility is the result of mental illness or mental retardation, the court will direct your client to treatment, either through commitment, placement in a private psychiatric facility, or, if appropriate, treatment in an alternative setting.

8. Disposition/Sentencing

You may want to request an evaluation to use as mitigation evidence in sentencing. Factors that might suggest referral for an evaluation are:

- Offense committed under influence of substances or history of substance abuse suggested;
- History of emotional/behavioral problems;
- History of abuse or neglect;

- History of poor academic achievement;
- Limited intellectual functioning; and
- History of violence.

Texas Law provides that children who receive indeterminate sentences to TYC must be released after the minimum period of time if their mental illness or mental retardation is preventing them from completing the program. TEX HUM. RES. CODE § 61.077(b). Try to find the least restrictive, best disposition for your client. If you and your client are discussing probation, make sure your client has the resources to successfully complete probation, thereby decreasing the chance that your client will reenter the juvenile justice system. When considering how best to dispose of your client's case through a plea bargain, ask:

- Is my client's family available to my client in positive and supportive ways?

- What are the treatment alternatives available in my client's community? (You should consider office-based counseling, intensive in-home services, day-treatment programs, and therapeutic foster-care as alternatives to a residential treatment center if alternative treatments are appropriate. Boot camps and other such programs are inappropriate placements for juveniles with mental disorders. For more serious or chronic offenders, you may want to present to the court your county's Community Resource Coordination Group (CRCG) as an alternative to a commitment to TYC. The CRCG in your county should bring together all the major players in the mental health and juvenile justice arenas to staff your client's case and come up with creative ways to successfully treat your client without incarceration in TYC.)

VI. What You Need to Know About Your Client (And What to Do About It)

A. Developmental Disabilities and What You Need to Know About Special Ed[29]

If your client has developmental disabilities, it is important for you to know about these and obtain the proper documentation. If you go to the prosecution with the information, it can help you get a favorable disposition of the case including, perhaps, a dismissal. Evidence of disabilities can also help with mitigation, or you may be able to use it to show that your client could not form the requisite intent for the offense charged.

If your client has education-related disabilities, taking the time to research them and to become knowledgeable about the federal special education laws (Individuals with Disabilities Education Act) may be the best investment you can make in your case and even your juvenile practice. There is a huge body of law and surprisingly broad remedies designed to assist children with these problems, if you bring an administrative action under the IDEA against the school district (or if the client's family hires a special education attorney). You can even recover attorney's fees if you prevail in a special education matter. And the matter may have a positive impact on your client's delinquency case.

Among the many features of the federal special education law, you can get the juvenile court to order free (to both the client and the court—it is paid for by the school system) evaluations of your client's special education eligibility, including neurological and other testing; the court can require individualized educational programs for the child, and may be required to order the child into the least restrictive placement available; you can get myriad services such as counseling, therapeutic recreation, mentoring, tutoring, job coaching, and a variety of other services that can extend, in most circumstances, until your client is 21 years old.

B. Race, Ethnicity, and Culture

You should always be sensitive to your client's racial, ethnic, and cultural background. These factors may play a role in how your client sees his or her case, and may even impact communications with court personnel and probation.

Racial and ethnic bias in the judicial system is a controversial topic. Whereas racial and/or ethnic bias is not present in every single juvenile case, research indicates that minority youth commonly receive more punitive sanctions than white youth charged with the same offenses, and are more likely than white youth to be detained and/or transferred to adult court.[30] In Texas, the minority youth population in 1997 was 53 percent, but 78 percent of commitments to public facilities and 77percent of detention placements in Texas were of minority youths.[31]

Perceptions of racial bias depend largely on people's backgrounds and experiences. A survey of more than 1,000 lawyers by the American Bar Association revealed that 52.4 percent of black lawyers and only 6.5 percent of white lawyers believe that there is "very much" racial bias in the justice system. Moreover, while 29.6 percent of white lawyers believe there is "very little" racial bias in the system, only 1.2 percent of black lawyers feel the same way.[32]

C. Language or Hearing Impairment

A juvenile's inability to fully comprehend the English language is likely to increase his or her difficulty in understanding the charges brought against him or her, as well as other elements of his or her case. Get an interpreter if you are unable to adequately communicate with your client due to a language barrier.

D. Nationality/Immigration Implications

If your client is a legal resident but not a U.S. citizen, s/he may not be deported merely because s/he has committed a juvenile delinquent act. The Board of Immigration Appeals decided in *In re* Miguel Devison-Charles that since a youthful offender's adjudication is not an adult conviction, it does not necessarily constitute a "conviction for immigration purposes" as in an

adult case.[33] If your client is placed in detention, you should nonetheless ensure that the appropriate national embassy or consulate is notified, which is your client's right according to the Vienna Convention.

E. Gender

The number of females entering the juvenile system has been on the rise, and there is still a dearth of treatment/rehabilitation programs designed for females.[34] If your client is a female, be aware that many females in the juvenile justice system are also mothers, and that there are other issues you should consider such as child care for their children, custody, etc.

F. Client Problems

Any kind of individual or family problem can be relevant to your client's case. Try to be open and creative when doing your research so that you appropriately use any factor in your client's complicated life to the advantage of his or her case. If you can address any of these problems through the disposition of the case, that will ultimately benefit your client, his or her family, and society at large.

Find out special problems that may be present in your client's situation: abuse at home; problems at school, either developmental or social; mental illness; medical condition; etc.

Here is a partial list of risk factors for children who come in contact with the juvenile justice system:[35]

1. School performance and behavior
   - Academic failure;
   - Special education;
   - Attendance problems; and
   - Suspensions and/or expulsions.
2. Family Problems
   - Lack of parental supervision and/or control;
   - Child abuse and neglect;
   - Sexual abuse;
   - Financial situation and poverty;
   - Family members with mental and/or medical condition, substance abuse, criminal records, etc.; and
   - Violence and/or relational problems between parents and/or other family members.
3. Delinquency Factors
   - Use of or experimentation with illegal drugs;
   - Delinquent or criminal peers and/or family members;
   - Gang involvement; and
   - Medical and/or mental condition.
4. Socioeconomic Factors
   - Neighborhood poverty, crime, economic condition, unemployment, racial and/or class segregation, etc.;
   - Quality of area schools; and
   - Race and ethnicity.

VII. HEARINGS

A. Detention Hearing

Detention is a short-term holding facility that is supposed to be used to ensure a child's appearance in court or if a child poses a danger. In detention, your client should be locked up with other kids and not with adults. You can probably get your client moved if s/he is being held with adults.

Juveniles are frequently detained for reasons that seem acceptable, but are in fact contrary to law or professional standards. The police or probation may not detain your client to: "teach him a lesson," "for his own good," "In order to get a mental health assessment," "to have more convenient administrative access to him,"[36] and/or "to ask him more questions."[37]

A detention hearing is to determine whether a child is to remain in detention until the court hears the case; it is a cross between a bail hearing and a probable cause hearing or examining trial. The hearing must be held on the second working day after the youth's detention, unless the youth is detained over a weekend, in which case it must be held on the first working day after detention. § 54.01(a). Reasonable notice of the hearing must be given to the child and his or her parents.

The child has a right to an attorney at the detention hearing, and if the family cannot afford an attorney, an attorney must be appointed at no cost. Due to the time constraints with detention hearings, the law allows for detention hearings to proceed without counsel. If the attorney is appointed after a detention hearing without counsel, then s/he may request a new detention hearing, which must be held not later than the second day after the request. § 54.01(n). Testimony by the child at the hearing is not admissible at any other hearing (§ 54.01(g)), but the substance of the testimony may help the prosecutor develop inculpatory evidence.

To continue to detain the child, the state must show that:

- S/he is likely to abscond or to be removed from the jurisdiction of the court;
- Suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person;
- The child has no parent, guardian, custodian, or other person able to return him or her to the court when required;
- The child may be dangerous to himself or herself or may threaten the safety of the public if released; or
- S/he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released. § 54.01(e).

There also must be a finding of probable cause that the youth committed the offense. If there is no probable cause finding, then continued detention is illegal. The detention then may be attacked through a habeas corpus action, but illegal detention is not grounds for setting aside an adjudication or disposition. The evidence permissible at a detention hearing includes all reliable and relevant non-privileged information, so hearsay is admissible. A detention hearing is not a final proceeding and therefore may not be directly appealed. Here, the D.A. will bring out whatever bad facts are present in your case, so you need to be prepared to contest probable cause or any gross mischaracterizations.

Because of the short turnaround time of these hearings, it may be best to focus only on the issues regarding continued detention in your first interviews with the parents and child. Explain at the beginning of the interview that you will be focusing only on these items, but that after the detention hearing you would like to have a longer interview about the circumstances surrounding the alleged offense. It is important to get as much relevant information as possible before the hearing.

One important item to remember is that your client's parents or guardians are essential to getting your client removed from detention. They are required to attend the hearing under § 51.115. They need to be willing to bring the child home and to bring the child to court for the next setting in order for your client to avoid continued detention. This can be a problem because

sometimes they want the child to stay in detention and "learn a lesson." It is important to let them know that if they do this it will reflect negatively on their child at the disposition hearing, as judges often consider this a sign that the parents cannot control the child. Because of their anger, parents can often express only negative feelings about their child during the detention hearing. It is important to discuss with them the likely result of this.

A release from detention may be conditioned on requirements if they are in writing and furnished to the child. § 54.01(f). If the conditions are violated, the child may be detained again. If this happens, the child starts through the normal detention cycle again.

If a child is not released at a detention hearing, there must be another detention hearing within 10 working days. The first detention hearing cannot be waived. Any subsequent detention hearing may be waived. Such a waiver only affects one hearing. For example, if the child or attorney waived the second detention hearing, there needs to be another detention hearing within 10 to 15 days (depending on weekends) of that waiver, unless that next hearing is waived as well. Detention hearings after the first one may be performed by interactive video recording. § 54.012.

There are more strict limitations on the time a status offender may be held in detention. § 54.011. A status offender is required to have a detention hearing start within 24 hours of arrival at the detention facility. Detention can only be continued if the offender violated a valid court order, unless the child is a runaway. If the offender is a runaway and needs to be returned home to another state, the youth may be detained for five days. Status offenders on probation may be detained for two 72-hour periods by the district judge.

B. Pretrial Motions

There are a number of motions you should consider filing. Discovery motions were discussed earlier, in Section IV(B).

1. Suppression Motion

   Suppression motions can take on a unique form in juvenile court because of the requirement of a voluntary and intelligent waiver of rights. Simply because of their age, juveniles may not understand the meaning of their rights and may not be competent to waive them. There are also special requirements for warning juveniles regarding the waiver of their rights. Texas requires that juveniles be taken before a Magistrate to be advised of their rights. The Magistrate must explain the *Miranda* rights to the youth outside of the presence of the arresting or interrogating officer. Always look into possible suppression issues if your client spoke with the police prior to the magistrate warnings, especially if there is a written statement.

   It is common for juveniles to make confessions to the police, probation officers, and/or other staff working in the juvenile justice system. If your client has confessed, the first thing you need to do is get a copy of the statement. You should also get the police report to determine the nature and length of the interrogation. Then, interview your client about the circumstances of the confession. Here are some questions that may help you determine if the statement was made voluntarily:

   - What did the police ask you? What did you tell them?
   - Where did they ask you questions? For how long?
   - Did anyone tell you your *Miranda* rights before asking questions? (Explain *Miranda* rights to the client.) Did they ask you if you understood each warning? What did you say?
   - Did you sign something?
   - Did you ask them to see your parents and/or a lawyer? If yes, what did they say?
   - Do you remember who was there? Was a person called the prosecutor, state attorney, district attorney, or D.A. there too? Do you remember people's names? (e.g., the D.A. may have been addressed by his or her first or last name.)
   - Did they show you anything or tell you about any witnesses?
   - Did they tell you anyone had accused you and/or had confessed?
   - Was there anyone with you at the time of the incident or did the police say there was?[38]
   - Was the interrogation tape recorded and/or videotaped?

- Did you take a lie detector test?
- Was the statement handwritten or typed? Who typed it? (Be wary of a typed statement.)
- Did the police officer tell you to add anything or change anything?[39]

Discuss the situation thoroughly with your client to ascertain that his or her confession was the entire truth. Research demonstrates that children often do not understand their *Miranda* rights.[40] You should attempt to suppress invalid admissions and consider demanding that a forensic clinician investigate the validity of your client's waiver of *Miranda* rights.[41] Written statements while a child is in custody require the child to be taken before a Magistrate. § 51.095.

If your client has a learning disability, and/or his or her reading and oral comprehension level is far below the current grade level, you may be able to convince the judge or jurors that s/he did not fully understand his or her *Miranda* rights. One of your client's educators could testify in order to elaborate on his or her frequent inability to comprehend what is said in class. The child may have claimed to understand his or her *Miranda* rights because s/he did not want people to think of him or her as "stupid," or may have been confused, scared, or intimidated. Please refer to this handbook's Section VI(A) on special education remedies for additional information.

Some juveniles think that they will be immediately released if they tell police officers what they want to hear. This misconception incites certain juveniles to admit guilt for crimes they did not commit, or to take all the blame for crimes they committed with the help of one or more accomplices. Parents also often hold these misconceptions. Make sure that the parents don't work at cross-purposes with you and your client by pushing their child to confess.

False or coerced confessions happen. The police are allowed to obtain confessions through psychological manipulation such as flattery, intimidation, sympathy, and false evidence. As a juvenile, your client is more susceptible to these tactics than are adults.[42]

2. *Ex Parte* Motion for Funds for Expert

Under *Ake v. Oklahoma*,[43] a defendant is entitled to expert assistance in preparing a defense. This has been held applicable to juvenile cases in Texas.[44] If, as appointed counsel, you believe that an expert is essential to the case and you do not want to tip your hand to the prosecutor, you are allowed to file an *ex parte* motion to request funds for the expert.[45] First, it is recommended practice that you file a motion requesting permission from the court to file your *ex parte* motion. If the court grants that motion, you may file an *ex parte* request for funds. You should also move to seal the record of those motions. If you plan on calling the expert at a hearing, it will most likely be necessary to disclose the expert to the state.

C. Transfer Hearing

A child may be transferred to adult court through either a discretionary procedure or a mandatory procedure. The procedure for a discretionary transfer depends on whether the youth has reached 18 years of age.

1. Mandatory Transfer

If a child under the age of 17 has already been transferred to adult court on another action, the court is required to transfer the new action to adult court. § 54.02(m). A hearing must be held in order to establish the predicate facts for mandatory transfer if the child has been previously certified. The court is not required to order a complete diagnostic study, or any of the other provisions applicable to a discretionary transfer hearing; this hearing is abbreviated. § 54.02(n). The court must take steps to transfer the case; while those steps are pending the offense is still considered a juvenile offense. Mandatory transfer does not apply if, in the previously transferred case, the child was not indicted by the grand jury; the child was found not guilty of the matter transferred; the matter transferred was dismissed with prejudice; or the child was convicted but the conviction was reversed on appeal that is final.

2. Discretionary Transfer – Person Under 18

There are two situations in which a juvenile court can transfer a person under the age of 18 to adult court. If the child was 14 years or older at the time of the alleged offense and the offense alleged is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and there has been no adjudication hearing, the court may trans-

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fer jurisdiction to the appropriate adult court. If the child was 15 years or older at the time of the alleged offense and the offense alleged is a felony of the second or third degree or a state jail felony and there has been no adjudication hearing, then the court may transfer jurisdiction to the appropriate adult court. Both of these instances require that the court have a full investigation and hearing, and that after the investigation and hearing the court find that there is probable cause to believe the child committed the offense alleged and that the welfare of the community requires adult proceedings. § 54.02(a). In determining this matter the court must consider whether the offense was against a person, the sophistication and maturity of the child, the record and previous history of the child, the likelihood of rehabilitation in juvenile court, and the protection of the community. § 54.02(f).

The court must order a "complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." § 54.02(d). At the hearing the court may consider these reports and other written reports. § 54.02(e). At least one day before the hearing, the court must make all written documents available to the defense. The court may require that counsel not disclose this material to the client. § 54.02(e).

3. Discretionary Transfer – Person Over 18
   If a person charged in juvenile court is 18 years of age or older, the juvenile court may transfer him or her to adult court based on a combination of the alleged offense and the person's age at the time of the alleged offense. § 54.02(j). When the alleged offense is capital murder, the court may transfer the person if s/he was between 10 years of age and 17 years of age at the time of the offense. Where the alleged offense is an aggravated controlled substance felony or a felony of the first degree, the court may transfer the person if s/he was between 14 years of age and 17 years of age at the time of the offense. Where the alleged offense is a second or third degree felony or state jail felony, the court may transfer the person if s/he was between 15 years of age and 17 years of age at the time of the offense. The court may not transfer the person if there has been an adjudication hearing. If the alleged offense is a misdemeanor, the court may not transfer the person.

   To transfer a person over the age of 18, the court must find by a preponderance of the evidence that there was a reason beyond the control of the state not to bring the charges before the person's 18th birthday, or that after due diligence by the state it was not practicable to proceed in juvenile court because: "(i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person; (ii) the person could not be found; or (iii) a previous transfer order was reversed by an appellate court or set aside by a district court." § 54.02 (j)(4). The court must also find that there is probable cause to believe the person committed the alleged offense.

4. Transfer to Justice or Municipal Court
   For status offenses and fine-only offenses the juvenile court may, with the justice or municipal court's permission, transfer jurisdiction to the justice or municipal court. §§ 54.021 and 54.023. The justice or municipal court is not allowed to order confinement for contempt under these sections.

D. Adjudication Hearing

The adjudication hearing is like the guilt/innocence phase of a criminal trial. Its purpose is to determine whether or not the juvenile committed delinquent conduct or is in need of supervision. The Family Code requires that there be an adjudication hearing even if there is a plea agreement. Decision by summary judgment is prohibited even though the proceeding is technically a civil one.

At the beginning of all adjudication hearings the court must make several admonishments, regardless of whether a plea agreement has been reached. The court must explain to the parents and the child the allegations made against the child, the possible consequences of the proceedings including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding, the child's privilege against self-incrimination, the child's right to trial, the child's right to confrontation of witnesses, the child's right to representation by an attorney if s/he is not already represented, and the child's right to a jury trial. § 54.03(b).

1. Adjudication With Agreement

When the state and a child agree to a disposition, the state must inform the court of the agreement. The court must inform the child that s/he is not required to accept the agreement. The court may wait until reviewing a report under § 54.04(b) to make its decision. If the court accepts the agreement, it must make the disposition as the agreement directs. If the court rejects the agreement, the court informs the child and gives the child an opportunity to withdraw the plea. Nothing from the plea can be heard in any other hearing on the case if the court rejects the plea. § 54.03(j). The court must also admonish the child that if s/he enters a plea, s/he can only appeal with the court's permission or when error is preserved by written motion. §§ 56.01(n) and 54.034.

Where the sides have reached an agreement, evidence of guilt must still be presented. It can be presented in two ways: an oral confession in court by the juvenile or a written stipulation.

2. Adjudication Without Agreement

An adjudication hearing may be a jury trial or a bench trial. Under Texas law, the child has a right to a jury trial. If the petition was approved by a grand jury, the jury must consist of 12 jurors. The jury's verdict must be unanimous. § 54.03(c).

Whether it is a jury trial or a bench trial, the trial may be before the juvenile court judge or the juvenile court master. The child has the right to have the case heard before the duly elected juvenile court judge. If the case is being heard in a county court where the judge was not elected and is not an attorney, the child has the right to be heard before a district court.

If the child is found not to have engaged in delinquent conduct, the court must dismiss the case with prejudice. § 54.03(g). Where the child is found to have engaged in delinquent conduct, the court or jury must state which of the allegations in the petition were found to be established by the evidence. The court must then set a date and time for the disposition hearing. § 54.03(h).

The state bears the burden of proof. If the defense pleads an affirmative defense, that may shift the burden. The standard of proof is beyond a reasonable doubt.[46] The youth is presumed innocent until proven guilty. The youth may be found to have committed a lesser included offense. § 54.03(f).

a) Evidence

The evidence must meet the requirements of The Rules of Evidence and Chapter 38 of the Code of Criminal Procedure. § 54.03(d). Only material, relevant, and competent evidence is admissible. Section 54.03(e) has special rules governing evidence. An out-of-court statement by the youth is insufficient to find guilt without corroboration. Accomplice testimony also is insufficient unless corroborated, and the failure to corroborate compels acquittal.[47] Illegally seized or obtained evidence is inadmissible. § 54.03(e). The social history report is inadmissible at this hearing.

b) Constitutional Protections

The youth has several constitutional rights. These include the right of confrontation, the right against self-incrimination (protected by *In re* Gault, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S. Ct. 1428 (1967) (see Appendix A for a case summary)), and the right to counsel, among others.

c) Voir Dire

If the trial is by jury, voir dire is similar to the way it is conducted in Texas criminal courts (and equally infamously pronounced). The number of strikes will depend on the type of court you are in and the number of jurors needed. There are some special considerations for voir dire in a juvenile case, such as the following:

- Look for prejudice against juveniles;
- Discuss perceptions (keep in mind they are often misperceptions) about the prevalence of juvenile crime; and
- Discuss statistics of crime trends in general.

E. Disposition Hearing

The disposition hearing is like the sentencing phase in a criminal trial. It is a separate and distinct proceeding from the adjudication and must be held after the adjudication. § 54.04(a). There is no right to a jury except in determinate sentence cases. § 54.04(a). The court is allowed to consider written reports from probation officers, professional court employees, or professional consultants. § 54.04(b). Prior to the hearing, the court must provide you access to any written reports. The court may order that the content of these reports not be disclosed to the child or parents.

No disposition may be made unless either the child is found to be in need of rehabilitation or disposition is necessary for the protection of the child or the public. § 54.04(c). A child may not be placed outside of the home unless the court finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the terms of probation.

Before the disposition hearing, you will want to have examined the probation report to find out what the probation department's recommendation will be. You will also probably have had some discussion with the prosecution regarding the disposition that the state will be seeking. Think about what they are seeking and what your client desires. You should discuss with your client ahead of time the possibilities in terms of disposition. If there is a good alternative program for which your client is eligible, argue for it at the disposition hearing. You may put on witnesses regarding the program and why it would fit your client's needs as well as the court's desires. See Section VIII(K) for more on this topic.

F. Modification of Disposition

A hearing may be had to modify a disposition on the petition of the child, parent, guardian, guardian ad litem, the child's attorney, prosecuting attorney, probation, or the court itself. §54.05(d). Any disposition except for a commitment to TYC may be modified. § 54.05(a).

Hearings to modify the disposition are often used when there is a violation of terms of probation in order to modify probation to a stricter disposition. The hearing can modify a disposition to commit a juvenile to TYC. If the hearing is to modify a disposition to a commitment to TYC, the hearing may not be waived. Any other modification hearing can be waived. The hearing may also be a means of changing the child's placement, if there is a concern regarding the placement.

The modification can usually only take place if the juvenile has not yet reached his or her 18th birthday. § 54.05(a). However, § 51.0412 allows the court to adjudicate a child past his or her 18th birthday if the petition is filed before the child turned 18 and the state exercised due diligence.[48] This is because all dispositions except for TYC terminate on the child's 18th birthday. If the child has been discharged by the court or operation of law, then the disposition may not be modified.

There is no right to a jury on a Modification of Disposition; however, there is the right to counsel. The parents or guardians must attend (subject to fines for contempt or mandatory counseling) and there is the right to a guardian ad litem if the parents or guardians are not present. § 51.115. Illegally seized evidence and confessions may not be used in the hearing. However, hearsay evidence such as social history reports may be introduced. The findings required in a disposition hearing for a court to remove a child from the home are not required in a modification of disposition hearing that removes the child from the home. In all cases, the court must state its reasoning for the modification. This is appealable under an abuse of discretion standard.

G. Appeal

The Texas Rules of Appellate Procedure and Chapter 56 of the Texas Family Code govern juvenile appeals. Appeals can be taken from adjudications (§ 54.03), dispositions (§ 54.04), modifications of dispositions (§ 54.05), commitment proceedings (Chapter 55), and transfers to the custody of the Texas Department of Criminal Justice, Institutional Division. Appeals cannot be taken from detention hearings.[49] The State does not have the right to appeal from an adverse judgement in juvenile court.[50]

Juvenile appeals are considered civil in nature. The timelines for civil appeals are used and the appeal will ultimately go to the Texas Supreme Court rather than the Court of Criminal Appeals. However, juvenile appeals are quasi-criminal, so some constitutional protections relating to criminal law still apply. These protections are interpreted by the Texas Supreme Court and can sometimes be at odds with the Court of Criminal Appeals, so keep that in mind when researching your arguments.

If you are appointed as counsel, you may be required to handle the appeal. If you are appointed or your client is indigent and you are representing him or her pro bono, your client may be allowed a free record and to proceed without cost. To get this you need to file an affidavit of indigence and an affidavit of free legal services. You should file these affidavits with the trial court.

If a case is remanded, the juvenile court retains jurisdiction, even if the child is over 18. § 51.041.

H. Juvenile Habeas

Juveniles have the right to apply for writs of habeas corpus. § 56.01(o). A writ of habeas corpus in a juvenile proceeding is given under the Texas Constitution and not through the Code of Criminal Procedure. Habeas is not limited by the requirements of the Family Code. For example, you may file a habeas motion for a client even if the client pled and there were no written motions.

VIII. The Disposition

A. Sanction Levels

Chapter 59 of the Texas Family Code contains the progressive sanction guidelines. The purpose of this Chapter is to increase uniformity in sentencing while still tying the sanction to the unique circumstances of each case. These sanction levels are intended to be a guide to what the disposition in a particular case should be. The application of the sanction levels is not a matter for appeal (§ 59.014) and there is no liability for failure to provide services described under the sanction levels (§ 59.013). However § 59.003(e) requires that a juvenile court or probation department put its reasons for deviation in writing if there is a deviation from the guidelines.

There are seven sanction levels. These sanction levels describe the various dispositions that the court, or in some instances the probation department, may impose. All sanctions except for those involving TYC must end on the child's 18th birthday. The court may modify any disposition except for commitment to TYC. The chapter also includes enhancements for repeat offenses.

The sanction levels are as follows:

- Level #1: Informal Disposition
- Level #2: Deferred Prosecution
- Level #3: Judicial Probation
- Level #4: Intensive Supervision Probation
- Level #5: Institutionalization at the Community Level
- Level #6: Indeterminate Sentence With the Texas Youth Commission
- Level #7: Determinate sentence With the Texas Youth Commission

Disposition Eligibility

	Informal Disposition	First Offender Program	Deferred Prosecution	Probation	Intensive Probation	Secure Residential Facility	TYC Indeterminate Sentence	Determinate Sentence	Transfer to Adult Court
CINS	Yes	Yes	Yes	Yes	Yes	No	No	No	No
Class C Misdemeanor	Yes	Yes	Yes	Yes	Yes	No	No	No	No
Class B Misdemeanor	Yes	Yes**	Yes	Yes	Yes	Yes	No***	No	No
Class A Misdemeanor	Yes	Yes**	Yes	Yes	Yes	Yes	No***	No	No
State Jail Felony	Yes*	Yes**	Yes*	Yes	Yes	Yes	Yes	No	Yes, at age 15
3rd Degree Felony	Yes*	No	Yes*	Yes	Yes	Yes	Yes	Some	Yes, at age 15
2nd Degree Felony	Yes*	No	Yes*	Yes*	Yes	Yes	Yes	Some	Yes, at age 15
1st Degree Felony	Yes*	No	Yes*	Yes*	Yes*	Yes	Yes	Yes	Yes, at age 14
Capital Felony	Yes*	No	Yes*	Yes*	Yes*	Yes*	Yes	Yes	Yes, at age 14
Aggravated/Controlled Substance Felony	Yes*	No	Yes*	Yes*	Yes*	Yes*	Yes	Yes	Yes, at age 14

* There is no statutory restriction on eligibility, but it is very, very unlikely you will get this; it also does not fit within the sanction guidelines.
** Unless it involves violence or the use of certain weapons.
*** Unless two prior misdemeanors.

B. Informal Disposition – look also to §§ 264.301-306

Texas Family Code § 52.03 allows a police officer to dispose of a juvenile case if: guidelines for such disposition have been adopted by the juvenile board of the county where disposition is made; the disposition is authorized by those guidelines; and the officer makes a written report. Such a disposition may not keep the child in custody or require reporting to a law enforcement officer or agency. This disposition may involve the referral of a child to an agency other than juvenile court, a brief conference with a child and the parents, or a referral of the child and the parents for services.

If a child is referred to a court or probation department, sanction level one may be assigned by the probation department alone or by the court. It is sometimes called supervisory caution. This level is for CINS conduct, except for violations under § 51.03(b)(5). At this level the court or probation department may: require counseling; inform the child of the sanctions that could be imposed for future delinquent conduct; inform the parents of their responsibilities to impose limits on behavior; provide assistance and information to the child and the parents regarding social services; require parents to participate in certain programs; refer the child to a community-based intervention program; and release the child to his or her parents.

A juvenile board may also create a first offender program under § 52.031. These programs apply to youth who are first time offenders taken into custody for CINS or delinquent conduct that is not a felony (except for state jail felonies that don't involve violence or use of a deadly weapon) or a misdemeanor involving violence or use of a deadly weapon. The juvenile board must designate which agencies will process the child under this program. There must be a written report filed by the officer who took the youth into custody.

The requirements for such a program are that there can be no detention of the youth, the parents and youth receive notice, and the parents and youth consent to the youth's participation in the program. The notice must state the grounds for taking the youth into custody, identify the officer or agency to which the child was referred, describe the program, and explain the consequences if the child fails the program. The program may require voluntary restitution, voluntary community service, training and rehabilitative services, and periodic reporting to the officer or agency to which the child was referred.

If the youth completes the program, the case may not be referred to juvenile court. The case may be referred to the juvenile court if the youth fails to complete the program, the youth or the parents terminate the child's participation in the program, or the child is taken into custody for a violation within 90 days of completing the program. No statement by a youth to a person working with the first offender program may be used against the youth in any delinquency or criminal proceeding.

C. Deferred Prosecution

This is for offenses that fall under sanction level two. It consists essentially of probation without a formal adjudication. The probation may not last more than six months. If the probation is successfully completed, the case must be dismissed with prejudice. Deferred prosecution is technically only available for CINS offenses or Class A and B Misdemeanors, although the prosecutor (and probably the Court) has discretion to send any case to deferred prosecution. § 53.03(e). Offenses in which there is use or possession of a firearm are not eligible. § 59.003(a)(2). Common terms for the probation include restitution, community service, and community-based services. The court can also require parents to attend certain services and identify the restrictions they will put on their child's behavior.

"It seems like only yesterday you were a juvenile offender."

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Deferred prosecution may be given if it satisfies the requirements of § 53.03. These include that it be in the best interests of the public and the child; the parents and

child consent with the understanding that consent is not required; and the parent and child are informed that they may terminate the deferred prosecution at any time and petition the court for a hearing on the case. The child may not be detained as part of deferred prosecution. An incriminating statement made by the child in discussions incident to deferred prosecution may not be used against the child in any court hearing. There is generally a fee charged in connection with deferred prosecution. A juvenile who completes a deferred prosecution program does not have to register as a sex offender, even if their offense was one covered by the law.

A related service is through the Teen Court program. Section 54.032 allows the deferral of adjudication proceedings for no more than 180 days if the child is alleged to have committed a CINS violation or a crime punishable by fine only. The child must testify under oath that the allegations are true and request to attend a teen court program. If the child has not successfully completed a teen court program for the same offense within the last two years and the program is approved by the court, the child can have the case dismissed if the program is completed within 90 days of the teen court's punishment hearing. The court may impose a $10 fee.

D. Judicial Probation

Sanction level three covers misdemeanors involving a firearm, state jail felonies, and third degree felonies. The court can place the child on probation for a period between six and 12 months. This probation generally includes restitution, community service, specific restrictions on the child's behavior, and a probation officer monitoring the child's activities and behaviors. The child's parents may also be required to participate in specific services.

E. Intensive Supervision Probation

When the offense involved is a second degree felony, sanction level four is applied. This probation requires the child to participate "for not less than three months or more than twelve months in an intensive services probation program that emphasizes frequent contact and reporting with a probation officer, discipline, intensive supervision services, social responsibility, and productive work." § 59.007(a)(1). Boot camps are an example of the kind of program that is envisioned by the section, but they are not the only possible type of program. After release from such a program the probation continues for between six and 12 months. This probation will also require restitution and community service. A change in language from the other levels makes it clear that there are to be more stringent requirements of probation and that there is to be more contact with the probation officer.

F. Institutionalization At the Community Level

Sanction level five is for a felony of the first degree except those involving deadly weapons or serious bodily injury. This level consists of six to 12 months in a post-adjudication secure residential facility, and then six to 12 months of in-home probation. Like the other levels, restitution and community service are generally required. The in-home probation has "highly structured" conditions and close monitoring by the probation officer.

The Texas Juvenile Probation Commission has a list of all of the approved post-adjudication facilities on its website. The Commission is in charge of oversight of these facilities. The facilities are generally run either by private corporations or local juvenile boards. It is a good idea to try to research the various facilities as they can vary in quality.

G. Indeterminate Sentence with the Texas Youth Commission (TYC)

Sanction level six is an indeterminate sentence to TYC. To be eligible for a commitment to TYC the youth must have been previously adjudicated of a felony offense or of two class A or B misdemeanors. Contempt of court charges are not factored in to this calculation. § 54.04(u). A status offender can never be sent to TYC for conduct that would not be a crime if the person were an adult. § 54.04(o). A youth may not be committed to the Texas Youth Commission for contempt of court. § 54.04(o)(3). To commit a youth to TYC the court must find that it is in the child's best interests to be placed outside the home, reasonable efforts were made to prevent the need for removal from the home, and the child cannot be provided the quality of care necessary to meet the conditions of probation. § 54.04(i).[51]

An indeterminate sentence means that the court cannot set the length of time a youth stays with the Texas Youth Commission. There are statutory minimums depending on the offense. (See the chart at right.) TYC may not hold a child past his or her 21st birthday. Unlike the previous sanction levels, a commitment to TYC may not be changed through a modification of disposition.

Minimum Lengths of Stay in TYC on Indeterminate Sentences

Type of Offense	Minimum Stay
Type A Violent Offender[1]	24 months
Type B Violent Offender[2]	12 months
Chronic Serious Offender[3]	12 months
Controlled Substance Dealer[4]	12 months
Firearms Offender[5]	12 months
General Offender[6]	9 months

1. Murder, capital murder, sexual assault, and aggravated sexual assault; this also includes inchoate offenses.
2. Manslaughter, criminally negligent homicide, felony unlawful restraint, kidnapping, aggravated kidnapping, felony assault, indecency with a child, aggravated assault, injury to child, elderly, or disabled individual, felony deadly conduct, felony terroristic threat, felony aiding suicide, tampering with consumer product, arson, robbery, aggravated robbery, burglary with intent to commit a violent offense, intoxication assault, intoxication manslaughter, and certain acts against TYC personnel.
3. Offense is a felony and youth has been adjudicated on two prior felonies; the felonies must be on separate dates.
4. Offense is a felony grade manufacture or delivery offense in the Texas Controlled Substances Act.
5. Court found that the youth used a firearm during the offense; cannot be given this designation for use by co-actor or co-conspirator.
6. Any offense not listed in the previous notes.

Until recently, Texas did not allow persons with mental illness or mental retardation to be committed to the Texas Youth Commission. This was because of fears that the youths' disorders would prevent them from gaining release. In 1997 Section 61.077(b) was added to Human Resources Code. This section requires the release of a child who has mental illness or mental retardation if s/he has completed the minimum length of stay for the offense and the commission determines s/he is unable to complete the program because of the illness or retardation. This section does not apply to determinate sentences.

H. Determinate Sentence with the Texas Youth Commission

This is the highest sanction available in juvenile court. Unlike the indeterminate sentence to TYC, this sentence is for a set number of years. For this disposition to be available, the prosecutor must get the petition approved by a grand jury. Because of the more serious nature of this sanction, the child has the right to a jury determination of sentence. If the right to jury sentencing is not waived prior to the examination of the jury panel, then a jury will sentence the youth. The jury may grant probation if the sentence is 10 years or less. If probation is granted, the judge controls the terms of probation.

If the offense is a capital felony, a first degree felony, or an aggravated controlled substance felony, the sentence may be no more than 40 years. The sentence for a second degree felony may be no more than 20 years. For an offense that is a third degree felony the sentence can be no more than 10 years. See the chart on page 35 for more details.

The sentence begins at TYC and will finish at the Texas Department of Criminal Justice, Institutional Division (TDCJ). The youth can be transferred from TYC to TDCJ at any point after his/her 16th birthday. The transfer is accomplished through a hearing. § 54.11. The hearing may be sought by TYC at any time after the youth's 16th birthday, or if the youth is on parole after the age of 16 and parole is revoked, or if the youth is on adult parole and parole is revoked.

The hearing is called a Transfer and Release Hearing and it is governed by § 54.11. Notice of the hearing must be given to the person to be transferred or released, the parents of that person, any legal custodian including TYC, the office of the prosecuting attorney that represented the state in delinquency proceedings, the victim of the offense or a member of the victim's family, and any other person who has filed a request to be notified of the release hearing. However, failure to give notice to any individual other than the person to be transferred or the prosecuting attorney does not affect the validity of the proceedings. The hearing is a public hearing. § 54.11(g). It is also a final, appealable proceeding.

The youth has the right to counsel and a guardian ad litem must be appointed if the youth's parents are not present. The youth may also have the right to expert assistance.[52] There is no right to a jury trial at this stage and there are no required admonitions. The court is supposed to consider the experiences and character of the person before and after commitment to the Texas Youth Commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendation of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided. § 54.11(k).

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The court is not required to state its reasoning and the evidentiary rules are relaxed. The court is allowed to consider any written documents and hearsay. However, all documents must be disclosed to counsel at least one day before the hearing and reasonable requests to continue the hearing should be granted, especially if necessary to call all appropriate witnesses.

A youth with a determinate sentence is eligible for parole. The minimum time depends on the offense for which the youth was sentenced and where s/he is at the time of parole. A youth in TYC must serve a minimum of 10 years for capital murder, 3 years for a first degree felony, 2 years for a second degree felony, and 1 year for a third degree felony. If the youth has been transferred to TDCJ, then the adult rules of parole apply. If the youth was transferred to TDCJ, it is important to

OFFENSES ELIGIBLE FOR DETERMINATE SENTENCES

Criminal Offense	Code Section	Maximum Sentence	Minimum Number of Years
Capital Murder	§ 19.03, Penal Code	40 years	10 years
Murder	§ 19.02, Penal Code	40 years	3 years[1]
Manslaughter	§ 19.04, Penal Code	20 years	2 years
Aggravated kidnapping	§ 20.04, Penal Code	40 years	3 years[2]
Sexual assault	§ 22.011, Penal Code	20 years	2 years
Aggravated sexual assault	§ 22.021, Penal Code	40 years	3 years
Aggravated assault	§ 22.02, Penal Code	20 years	2 years[3]
Aggravated robbery	§ 29.03, Penal Code	40 years	3 years
Injury to a child, elderly individual, or disabled individual (if felony other than state jail)	§ 22.04, Penal Code	40, 20, or 10 depending on offense	3, 2, or 1 years[4]
Felony deadly conduct involving discharging a firearm	§ 22.05(b), Penal Code	10 years	1 year
First degree drug felony	Subchapter D, Chapter 481 Health and Safety Code	40 years	3 years
Aggravated controlled substance felony	Subchapter D, Chapter 481 Health and Safety Code	40 years	3 years
Criminal solicitation	§ 15.03, Penal Code	20 years/ 40 years if capital	2 years, 3 years if capital
Indecency with a child	§ 21.11(a)(1), Penal Code	10 years, 20 if contact	2 years if by contact, 1 year if by exposure
Criminal solicitation of a minor	§ 15.031, Penal Code	40, 20, or 10 years, depending on the offense	One level lower than solicited offense
Criminal attempt for murder, capital murder, or a 3g offense	§ 15.01, Penal Code	40, 20, or 10 years, depending on the offense	One level lower than attempted offense
Arson, if bodily injury or death is suffered by any person	§ 28.2, Penal Code	40 years	3 years
Intoxication manslaughter	§ 49.08, Penal Code	20 years	2 years
Habitual felony conduct	§ 51.03, Family Code	20 years or 10 years, depending on the offense	2 years or 1 year

1. 2 years if under influence of sudden passion.
2. 2 years if victim released voluntarily and in safe place.
3. 3 years if against or by public servant or against a witness or informant.
4. 3 years if serious injury and knowing or intentional, 2 years if serious and reckless, or if just injury and knowingly or intentional, 1 year if just injury and reckless.

remember that s/he may be up for mandatory release if calendar time served and good conduct time equal the youth's sentence. TYC is allowed to petition for early parole of the youth. If it does so, the prosecutor is not allowed to represent TYC as their interests may be in conflict. Either the youth's attorney or TYC's attorney represents the commission at the hearing for early parole.

Who supervises the parole is mainly determined by the age of the child when paroled. If the youth is under 19 when paroled, TYC supervises the parole until the youth is 21. If the youth is 19 or older when paroled, TDCJ supervises the youth's parole.

I. Transfer to Adult Court

While technically not a disposition, if a juvenile is tried as an adult, the consequences of a conviction bring different punishments. A juvenile in adult court is treated as any other adult, except that the death penalty may not be sought. Other than that, sentences are exactly the same. It is important to be familiar with those punishments, so that you may properly advise your client regarding the effects of a transfer to adult court.

J. Other Consequences

In addition to traditional punishments like probation and confinement, the Texas Legislature and U.S. Congress have created other negative consequences for delinquent behavior.

1. Driver's License Suspension
   DWI offenses and certain controlled substance offenses require the suspension of a juvenile's license. § 54.042(a). The court also has the option of suspending the juvenile's license for any offense. § 54.042.

2. Sex Offense Conditions
   Where a juvenile is adjudicated delinquent of a sex offense, there are a number of additional conditions imposed on him/her. If s/he is placed on probation, s/he must have counseling sessions and give a blood sample for DNA records. If a juvenile is adjudicated delinquent for sexual assault, aggravated sexual assault, or indecency with a child, s/he will be required to have HIV testing. § 54.033. The biggest requirement for juveniles adjudicated for a sex offense is that they are subject to the registration requirements. Failure to satisfy those requirements is a state jail felony for the first offense and a third degree felony for a subsequent offense. Juveniles are under this duty until 10 years after they complete the terms of their disposition. CODE OF CRIMINAL PROCEDURE § 62.12(b)(1).

3. Enhancement in Adult and Juvenile Cases
   An adjudication counts as a prior conviction in adult court and therefore can lead to enhanced sentences under relevant statutes. A prior adjudication can also lead to enhanced sentences in the juvenile justice system.

4. Handguns
   If a child is placed on probation for an offense where s/he personally used a handgun, s/he must, within 30 days of the start of probation, tell the probation officer how s/he acquired the weapon.

5. Expulsion and removal to AEP
   An adjudication of delinquency for certain offenses is grounds for expulsion by a school district. (For any felony referral, see EDUCATION CODE Chapter 37.)

6. Financial Aid
   The Federal Government has passed legislation denying any federal financial aid to individuals convicted (or adjudicated) of a drug crime. The denial lasts for certain periods of time, which increase with repeat offenses. Students may have to contend with other repercussions of their dispositions.

7. Immigration
   As discussed in Section VI(D), as long as a case is handled within the juvenile justice system, there are generally no immigration consequences.[53] However, if a case is transferred to adult court, there is a possibility of a conviction and, if your client is not a citizen, this can lead to deportation and other consequences regarding naturalization.

K. Alternatives to TYC

Nationwide, juvenile justice agencies devote the majority of their funds to confining a relatively small segment of the juvenile population—including numerous non-violent children—in large, overcrowded correctional institutions.[54] Unfortunately, recidivism rates are frequently high for children who are released from these institutions, as in many cases habilitative/rehabilitative services are lacking. Research consistently has demonstrated that incarceration in secure facilities for many juveniles is less beneficial than smaller correctional programs providing greater individual care. Programs that place a stronger emphasis on counseling, education, job training, life skills preparation, conflict resolution, and mental health treatment are more successful.[55] These programs are also beneficial to society because of better recidivism rates and lower costs.[56] You should therefore be aware of alternatives that may give your client a better chance to habilitate/rehabilitate himself or herself.

Make an effort to ensure that your client is sent to a quality-tested program that will meet his or her needs. By increasing the number of days clients spend being habilitated/rehabilitated and receiving treatment in their homes and/or communities rather than in institutions, the following examples of program models have been successful in generating lower recidivism rates than more conventional programs.[57] They recognize that addressing problems in youths' natural environments, rather than in artificial institutional settings, enables children to learn lessons they will be able to relate to their everyday lives:[58]

Multisystemic Therapy: Mental health counselors work with troubled teenagers and their families in their homes because behavioral problems can often be traced back to the family system: "Therapists seek to determine the negative dynamics that propel the young person toward delinquency – be they poor parenting, substance abuse, a learning disability, or attachment to delinquent peers. The therapist engages the family in strategies to overcome these root problems, while at the same time coaching parents in behavior management strategies to begin re-establishing order and respect in the home. During the process, therapists might refer the youth, parents, or even siblings to a wide range of possible supports—a substance abuse program, a job placement service, an after-school youth program, whatever it takes to overcome the problems and stabilize the family."[59]

Multidimensional Treatment Foster Care: This model "combines short-term, therapeutic foster care with intensive counseling for the natural family, followed by rapid reunification and ongoing support."[60]

How to have your client committed to a quality-tested program suitable for his or her needs: If you conduct some research before the adjudicatory phase of the trial, you may be able to convince the judge to consider committing your client to a program best suited to his or her needs by:

- explaining how the program is suited to your client's needs;
- describing how the program functions (daily routine, staff qualifications, bed capacity, etc.);
- presenting data suggesting its success rate (e.g., recidivism rate, graduation rate, GED completion rate, etc.); and
- ascertaining that it has room for your client by calling beforehand.

Be sure to determine the cost, who pays, and what insurance the facility accepts (Medicaid, CHIP, etc.).

CHECKLIST FOR JUVENILE PLACEMENTS

- Program fit to the juvenile's special needs;
- Qualified Staff;
- Intense focus on rehabilitation/habilitation through counseling, treatment, and training;
- Active promotion of rules and standards stressing positive interaction for inmates and staff at all times;
- As non-restrictive an environment as possible – only a small proportion of juveniles are "dangerous";
- Small facility – better staff control, more emphasis on counseling, treatment, and training;
- As close as possible to the juvenile's own community and natural environment;[61] and
- Exclusively for juveniles – no contact with adult inmates.

IX. Resources for Help

www.juvenilelaw.org - Texas Bar Association Juvenile Law Section
This site has information regarding the Section and summaries of juvenile cases updated weekly. The site also has information on the new legal specialization in juvenile law. Joining the section will get you four issues of their newsletter, an additional legislative issue on odd-numbered years, and the Texas Juvenile Law 6th Edition, when it comes out in fall of 2003. The section also hosts an annual conference on juvenile law every February.

http://www.abanet.org/crimjust/juvjus/ - National Juvenile Defender Center
This site has a lot of research and references on juvenile justice issues. It looks at issues at a national level but has links to local resources as well.

http://www.tjpc.state.tx.us/ - Texas Juvenile Probation Commission
This site is an important resource for juvenile practitioners. The site has a list of approved residential facilities, which can be invaluable when looking for possible placements. The site also has reports and procedures from the Juvenile Probation Commission. There are publications and statistics regarding probation and detention in Texas, links to related information, lists of probation procedures, facilities, and a whole lot more.

http://www.tyc.state.tx.us/ - Texas Youth Commission
This site has information regarding the Texas Youth Commission.

http://www.southwestkey.org – Southwest Key
Southwest Key is a not-for-profit agency providing a continuum of services to troubled youth and their families. The site outlines in more detail some of these programs.

This list may be expanded in the online version.

ENDNOTES

1. *See* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Juvenile Offenders and Victims: National Report Series Bulletin* (December 2001) <http://www.ncjrs.org/pdffiles1/ojjdp/191031.pdf>.
2. *See* Criminal Justice Policy Council, State of Texas, statistics compiled from the Texas Department of Public Safety Uniform Crime Report (UCR) and available at <http://www.cjpc.state.tx.us/StatTabs/Arrests/00Arrest7.pdf>.
3. *See* TEXAS APPLESEED, *Selling Justice Short: Juvenile Indigent Defense in Texas* 4 (Oct. 2000) <http://www.appleseeds.net/tx/TX_Appleseed_Juvenile_Report_102400.pdf>.
4. *See, e.g.*, Building Blocks for Youth, *Off Balance: Youth, Race and Crime in the News* (Apr. 2001) <http://www.buildingblocksforyouth.org/media/media.html>.
5. Texas Youth Commission, *Who are TYC Offenders?* (June 10, 2002) <http://www.tyc.state.tx.us/research/youth_stats.html>.
6. *See, e.g.*, CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 330 (Macmillan) (3d ed. 1991).
7. *See, e.g.*, RICHARD A. MENDEL, AMERICAN YOUTH POLICY FORUM, *Less Cost, More Safety: Guiding Lights for Reform in Juvenile Justice* 8-9, 21-27 (2001) <http://www.aypf.org/lesscost/index.html>.
8. *See* TEXAS APPLESEED, *Selling Justice Short*, *supra* note 1, at 4.
9. *See* Marc A. Schindler, *Mental Health Issues Facing Adolescents in the Juvenile Justice System*: Part I, AACAP NEWS ISSUE I 11 (American Academy of Child and Adolescent Psychiatry Vol. 30 Jan./Feb. 1999).
10. *See* Wendy Grossman, *Out of Mind, Out of Sight*, DALLAS OBSERVER, November 8, 2001, at 1 ¶ 7 <http://www.dallasobserver.com/issues/2001-11-08/feature.html/1/index.html>.
11. *See* Texas Youth Commission, *Who Are TYC Offenders?, supra* note 5.
12. Grossman, *supra* note 10, at 1 ¶ 5.
13. *See* Steve Brewer, *Meeting for the Minds*, HOUSTON CHRONICLE, Nov. 18, 2000, at 3.
14. We use the shorthand "parents," while in most instances the statements apply equally to guardians.
15. For an extremely detailed examination of juvenile law in Texas, see ROBERT O. DAWSON, TEXAS JUVENILE LAW 5TH EDITION (Texas Juvenile Probation Commission 2000).
16. *See, e.g.*, SIMONSEN, *supra* note 6; STEVE LERNER, THE GOOD NEWS ABOUT JUVENILE JUSTICE: THE MOVEMENT AWAY FROM LARGE INSTITUTIONS AND TOWARD COMMUNITY-BASED SERVICES (Common Knowledge Press 1990).
17. *See, e.g.*, Beyer, Marty Ph.D., KENTUCKY CHILDREN'S RIGHTS JOURNAL Vol. VII, No. 1 (Spring 1999).
18. *See Id.*
19. It is allowable for the attorney also to serve as guardian ad litem; however, this can lead to conflicts of interest.
20. For an excellent treatment of initial interviews in detail, see RANDY HERTZ, MARTIN GUGGENHEIM, & ANTHONY AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 5 (American Law Institute/American Bar Association 1991).
21. Knowledge of child abuse and knowledge of future violent crimes are exceptions to the attorney-client privilege.
22. A status offense is an offense based on the minority of the offender, such as truancy, curfew violation, or running away. A status offense is not as serious as a crime. Status offenses can lead to a finding that a juvenile is a Child In Need of Supervision (CINS).

23. *See* DeLeon v. State, 684 S.W.2d 778, 782 (Tex. Crim. App. 1984).

24. All code sections to which this handbook makes reference are in the TEXAS FAMILY CODE, unless otherwise noted.

25. As of August 2002.

26. "Mental illness" often is used interchangeably with "mental disorder." Mental illness, however, is a subset of mental disorder, which is the more general term.

27. *See* Schindler, *Mental Health Issues Facing Adolescents in the Juvenile Justice System, supra* note 9, at 23.

28. This section on evaluations and evaluators was taken in large part from Lourdes M. Rosado, *Mental Health Assessments in the Justice System: How to Get High-Quality Evaluations and What to Do With Them in Court* (June 2000), available at http://www.jlc.org/home/JLC@Work/juvenilejustice/curriculum.htm, and is used here with permission. Please refer to this source for a much more complete discussion of mental health evaluations in the juvenile justice system.

29. You can find out more about this important set of remedies in J.B. TULMAN & J.A. MCGEE, EDS., SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUINCY SYSTEM (Washington, DC: University of the District of Columbia, David A. Clarke School of Law, Juvenile Law Clinic 1998). You can download the document at www.napas.org, or call the University of the District of Columbia at (202) 274-7317 to obtain a copy.

30. *See, e.g.*, Building Blocks for Youth, Youth Law Center, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* (Apr. 2000) <http://www.buildingblocksforyouth.org/justiceforsome/jfs.html>.

31. Building Blocks for Youth, *Disproportionate Minority Confinement* <http://www.buildingblocksforyouth.org/statebystate/txdmc.html>, citing *Juvenile Offenders and Victims: 1999 National Report*, Office of Juvenile Justice and Delinquency Prevention (1999).

32. American Bar Association, *Race and the Law: A Special Report by the ABA Journal*, ABA JOURNAL (Feb. 1999).

33. *In re* Miguel Devison-Charles, Int. Dec. 3435, 2000 BIA LEXIS 21 (BIA 2000).

34. See Miriam Rozen, *Girls In Trouble: Rising Arrest Rates Threaten to Overwhelm State Facilities for Juveniles*, TEXAS LAWYER, Sept. 2, 2002, at 22.

35. This list was partially derived from MENDEL, *supra* note 7, at 30.

36. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, DESKTOP GUIDE TO GOOD JUVENILE PROBATION PRACTICE 68 (May 1993).

37. *See, e.g.*, Bill Rust, *Juvenile Jailhouse Rocked: Reforming Detention in Chicago, Portland, and Sacramento*, ADVOCASEY 1 (Annie E. Casey Foundation Fall/Winter 1999) <http://www.aecf.org/publications/advocasey/winter99/juv/juv.pdf>.

38. If one of the accomplices is an adult, s/he will be less likely to make a confession and may even gladly let the juvenile accept complete responsibility for the crime and, of course, any negative consequences.

39. *See* JUVENILE DEFENDER DELINQUENCY NOTEBOOK 132-33.

40. *See, e.g.*, THOMAS GRISSO, ASSESSING UNDERSTANDING AND APPRECIATION OF *MIRANDA* RIGHTS (1998).

41. *See* MARC J. ACKERMAN, ESSENTIALS OF FORENSIC PSYCHOLOGICAL ASSESSMENT 170 (John Wiley & Sons 1999).

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42. For a fuller description of typical police methods, see FRED E. INBAU, JOHN E. REID, ET. AL., CRIMINAL INTERROGATION AND CONFESSIONS, 4TH ED. (Aspen 2001). For more information on a juvenile's competency to waive *Miranda* rights, see ACKERMAN, *supra* note 41, at 170-77.

43. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

44. *See, e.g.*, Williams v. State, 958 S.W.2d 186 (Tex. Crim. App. 1997).

45. *See* United States v. Pofahl, 990 F.2d 1456, 1471 (5th Cir. 1993), *cert. denied sub nom.* Nunn v. United States, 510 U.S. 898, 114 S. Ct. 266; 126 L. Ed. 2d 218 (1993); Williams, 958 S.W.2d at 193.

46. This standard is required by *In re* Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (see Appendix A for a case summary).

47. *In re* J.R.R., 696 S.W.2d 382 (Tex. 1985).

48. Overrules N.J.A., 997 S.W.2d (Tex. 1999).

49. *In re* J.L.D., 704 S.W.2d 939 (Tex. App.—Corpus Christi 1985, no writ).

50. C.L.B. and L.J.B. v. State, 567 S.W.2d 795 (Tex. 1978).

51. *See also In the matter of* J.T.H., 779 S.W.2d 954 (Tex. App.—Austin 1989).

52. *See, e.g.*, Ake, 470 U.S. 68.

53. *See In re* Miguel Devison-Charles, Int. Dec. 3435, 2000 BIA LEXIS 21 (BIA 2000).

54. *See* MENDEL, *supra* note 7, at 39.

55. *See id.*; LERNER, *supra* note 17; SIMONSEN, *supra* note 6.

56. *See, e.g.*, MENDEL, *supra* note 7, at 21.

57. *See id.* at 39.

58. *See id.* at 35.

59. *Id.* at 22.

60. *Id.* at 21.

61. *See* MENDEL, *supra* note 7, at 35.

APPENDIX A: LANDMARK SUPREME COURT DECISIONS

Kent v. United States

In Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), Morris Kent, at the age of 16 and while on probation for previous offenses, was arrested for rape and robbery. The juvenile court waived its jurisdiction and transferred the case to the U.S. District Court for the District of Columbia. In so doing, the juvenile court held no hearing and did not rule on the Kent's counsel's motions for a waiver hearing and for access to Kent's juvenile social service file, which was compiled by juvenile court officials during Kent's probation. After a trial in the district court, Kent was acquitted by reason of insanity of the rape charge, but convicted on six counts of housebreaking and robbery. He was sentenced to a total of 30 to 90 years in prison. Kent appealed and the United States Court of Appeals for the District of Columbia Circuit affirmed.

Kent appealed to the United States Supreme Court, which reversed and remanded to the district court to determine, after a de novo hearing on waiver, whether waiver was inappropriate. Interpreting the District of Columbia's Juvenile Court Act "in the context of constitutional principles relating to due process and the assistance of counsel," 383 U.S. 541, 557 (1966), the Supreme Court held that the waiver of juvenile court jurisdiction was a "critically important" action that entitled juveniles to a hearing with the assistance of counsel, access to records, and a statement of the reasons for the juvenile court's decision.

***In re* Gault**

In *In re* Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), Gerald Gault ("the child") was 15 years old and on probation when he was taken into custody after a female neighbor complained of lewd phone calls. After a hearing before the juvenile court, the child was ordered committed into the State Industrial School until he attained the age of 21. The child's parents filed a writ of habeas corpus in the state courts, challenging, on due process grounds, the constitutionality of Arizona's Juvenile Code and the procedure actually used in their child's case. The Arizona Supreme Court affirmed the dismissal of the petition for the writ.

The United States Supreme Court reversed, holding that the juvenile court adjudication of "delinquency" must comply with due process requirements. The Court held that the child and his/her parents or guardian must be given notice of the delinquency hearing, with specific allegations against the child set out, enough in advance of the hearing to prepare. Also, it held that the child and parents/guardians must be advised of their right to be represented by counsel and that, if they cannot afford counsel, that counsel would be appointed to represent the child. The Court also held that the constitutional privilege against self-incrimination applies in such proceedings and that, absent a valid confession, a juvenile in such proceedings must be afforded his/her constitutional rights of confrontation and sworn testimony of witnesses available for cross-examination.

***In re* Winship**

In *In re* Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), a New York Family Court judge relied on a preponderance of the evidence, the standard of proof required by the New York Family Court Act, in finding that the child, a 12 year old boy, had committed a crime that would be considered a larceny if adjudicated in adult court. The New York Court of Appeals affirmed the conviction, but the United States Supreme Court reversed. The Supreme Court held that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law.

Fare v. Michael C.

In Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979), Michael C. ("the child") was 16 years old and on probation when he was implicated in a murder. He was advised of his *Miranda* rights and asked if his probation officer could be present during the interrogation, but the police refused. He then agreed to talk to the police without an attorney and subsequently incriminated himself in the murder. The probation department then moved to make the child a ward of the state based on his incriminating statements. The child moved to suppress the statements but the trial court denied the motion. The Supreme Court of California reversed, holding that statements had been made in violation of the child's Fifth

Amendment right against self-incrimination. Specifically, the California Supreme Court held that the child's request for his probation officer constituted a per se invocation of his Fifth Amendment rights in the same way that a request for an attorney was found to be.

The United States Supreme Court reversed, holding that the child's request for his probation officer was not a per se invocation of his Fifth Amendment *Miranda* rights. The Court went on to hold that "whether the statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, but who has not asked to consult an attorney or expressly asserted his right to remain silent, are admissible on the basis of waiver remains a question to be resolved on the totality of the circumstances surrounding the interrogation." 442 U.S. 707,728 (1979). The court went on to conclude that, based on the records before it, the statements obtained by the police were proper and their admission was correct.

Notes

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